No. 16-6219 *** CAPITAL CASE ***

Title: Erick Daniel Davila, Petitioner
v.
Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Docketed: September 28, 2016

Lower Ct: United States Court of Appeals for the Fifth Circuit

Case Nos.: (15-70013)

Decision Date: May 31, 2016

Rehearing Denied: June 28, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Sep 22 2016	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 28, 2016)
Oct 26 2016	Order extending time to file response to petition to and including November 28, 2016.
Nov 23 2016	Brief of respondent Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed.
Dec 7 2016	Reply of petitioner Erick Daniel Davila filed. (Distributed)
Dec 8 2016	DISTRIBUTED for Conference of January 6, 2017.
Jan 9 2017	DISTRIBUTED for Conference of January 13, 2017.
Jan 13 2017	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Question 1 presented by the petition.
Jan 23 2017	Motion to appoint counsel filed by petitioner Erick Daniel Davila.
Feb 8 2017	DISTRIBUTED for Conference of February 24, 2017.
Feb 17 2017	SET FOR ARGUMENT ON Monday, April 24, 2017
Feb 24 2017	Record requested from the U.S.C.A. 5th Circuit.
Feb 27 2017	Motion to appoint counsel filed by petitioner GRANTED and Seth Kretzer, Esquire, of Houston, Texas, is appointed to serve as counsel for the petitioner in this case.
Feb 27 2017	Joint appendix filed. (Statement of costs filed)
Feb 27 2017	Brief of petitioner Erick Daniel Davila filed.
Mar 2 2017	Record received from the U.S.C.A. 5th Circuit. The record is electronic and available on PACER.
Mar 3 2017	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for the Respondent.
Mar 6 2017	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Mar 22 2017	CIRCULATED.
Mar 29 2017	Brief of respondent Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. (Distributed)
Mar 30 2017	Brief amicus curiae of The Criminal Justices Legal Foundation filed. (Distributed)
Apr 5 2017	Brief amici curiae of Nevada, et al. filed. (Distributed)
Apr 5 2017	Motion of Nevada, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.

Apr 13 2017	Motion of Nevada, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED. Justice Gorsuch took no part in the consideration or decision of this motion.
Apr 17 2017	Reply of petitioner Erick Daniel Davila filed. (Distributed)
Apr 24 2017	Argued. For petitioner: Seth Kretzer, Houston, Tex. (Appointed by this Court.) For respondent: Scott A. Keller, Solicitor General, Austin, Tex.
Jun 26 2017	Adjudged to be AFFIRMED. Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Alito, and Gorsuch, JJ., joined. Breyer, J., filed a dissenting opinion, in which Ginsburg, Sotomayor, and Kagan, JJ., joined.
Jul 28 2017	JUDGMENT ISSUED.

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No. 16-6219

RECORD
AND
BRIEFS

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

ERICK DAVILA,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Court-Appointed CJA Counsel
Counsel of Record for Petitioner

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No. 16-6219

IN THE SUPREME COURT OF THE UNITED STATES

ERICK DAVILA,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

To the Supreme Court of the United States:

Erick Davila, a Texas death row inmate, respectfully seeks leave to proceed *in forma pauperis*. With this motion he has filed a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Mr. Davilais indigent. He has been incarcerated since his arrest and always had court-appointed lawyers. Mr. Kretzer and Mr. Landers were appointed by the U.S. District Court under the Civil Justice Act of 1964, 18 U.S.C. § 3006A, to represent Davila in his federal habeas action. Neither Mr. Kretzer or Mr. Landers

have received any funds, or the promise of any funds, from any other source other than under the Act for payment of legal fees for his habeas action.

For the reasons set forth above, Petitioner respectfully prays that this Court grant leave to proceed *in forma pauperis*.

Respectfully submitted this 22nd day of September 2016,

By: _____

Seth Kretzer
Texas BN: 24043764

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CJA Appointed Attorney for the
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CERTIFICATE OF MAILING

I hereby certify that, on the 22nd day of September 2016, this pleading was deposited with the U.S. Postal Service, in an envelope or package correctly addressed, with sufficient postage to assure delivery by certified first-class mail, R.R.R.

_____

Seth Kretzer

CERTIFICATE OF SERVICE

I hereby certify that, on the 22nd day of September 2016, a true and correct copy of this motion was mailed by first-class U.S. mail to:

AAG Katherine Hayes
Office of the Attorney General
Postconviction Litigation Division
P.O. Box 12548, Capitol Station
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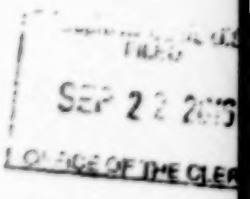
Seth Kretzer

No. 16-6218

IN THE SUPREME COURT OF THE UNITED STATES



ERICK DANIEL DAVILA,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Appointed CJA Counsel of
Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW (CAPITAL CASE)

1. DOES THE RULE ESTABLISHED IN *MARTINEZ V. RYAN*, 132 S.CT. 1309 (2012) AND *TREVINO V. THALER*, 133 S. CT. 1911, 1921 (2013), THAT INEFFECTIVE STATE HABEAS COUNSEL CAN BE SEEN AS CAUSE TO OVERCOME THE PROCEDURAL DEFAULT OF A SUBSTANTIAL INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM, ALSO APPLY TO PROCEDURALLY DEFAULTED, BUT SUBSTANTIAL, INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS?

2. IN LIGHT OF *HURST V. FLORIDA*, 136 S. CT. 616, 622 (2016), MUST TEXAS' SECOND PUNISHMENT SPECIAL ISSUE, WHICH IS A NECESSARY FINDING FOR A SENTENCE OF DEATH, BE DECIDED BY THE JURY BEYOND A REASONABLE DOUBT?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which the Petitioner, Erick Daniel Davila, was the Petitioner before the United States District Court and the Petitioner-Appellant before the United States Court of Appeals for the Fifth Circuit. Mr. Davila is an inmate sentenced to death and is in the custody of Lorie Davis, Director of the Texas Department of Criminal Justice, Institutional Division ("Director"). The Director and his predecessors were the Respondents before the United States District Court and the Respondent-Appellees before the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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CITATIONS OF OPINIONS AND ORDERS ENTERED BELOW

The Fifth Circuit denied Davila's certificate of appealability and all other relief in an unpublished (revised) decision on May 31, 2016. The decision is cited as *Davila v. Davis*, No. 15-70013, 2016 WL 3171870; 2016 U.S. App. LEXIS 9681 (5th Cir. 2016) and is attached as Appendix A. The Petition for Rehearing *En Banc* was denied by form order on June 28, 2016. The District Court entered its Memorandum and Order denying all requested relief on April 21, 2015. The citation to this Memorandum and Order is *Davila v. Stephens*, 2015 WL 1808689; 2015 U.S. Dist. LEXIS 51854 (N.D. Tex. 2015) and it is attached as Appendix B.

The state habeas court adopted the prosecution's proposed "Findings of Fact and Conclusions of Law" recommending all claims be denied for lack of merit. The Texas Court of Criminal Appeals adopted the same, noted that two of the three claims were also defaulted, and denied habeas corpus relief. *Ex parte Davila*, No. WR-75,356-01, 2013 WL 1655549; (April 17, 2013) (unpublished). This Court denied certiorari. *Davila v. Texas*, 134 S. Ct. 784 (December 9, 2013). The trial court's Findings of Fact and Conclusions of Law are attached as Appendix C.

In 2011, the Texas Court of Criminal Appeals affirmed Davila's conviction and sentence on direct appeal. *Davila v. State*, No. AP-76,105, 2011 WL 303265; 2011 Tex. Crim. App. Unpub. LEXIS 43 (Tex. Crim. App. 2011) (Jan. 26, 2011) (Appendix D) and this Court denied certiorari, 132 S. Ct. 258 (Oct. 3, 2011).

STATEMENT OF JURISDICTION

The Circuit Court's amended decision was filed May 31, 2016, and Davila's timely filed Petition for Rehearing En Banc was denied on June 28, 2016. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 2253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Eighth Amendment to the United States Constitution provides, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[.]

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d) provides, in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits on State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Texas Code of Criminal Procedure article 37.071 establishes the sentencing procedure for death penalty cases and provides, in pertinent part:

Section 2

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

. . .

(c) *The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt*, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

(2) The court shall:

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the Texas Department of Criminal Justice for life without parole; and

(B) charge the jury that a defendant sentenced to confinement for life without parole under this article is ineligible for release from the department on parole.

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

(3) need not agree on what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) and a negative finding on an issue submitted under Subsection (e)(1), the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) or an affirmative finding on an issue submitted under Subsection (e)(1) or is unable to answer any issue submitted under Subsection (b) or (e), the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole.

(*emphasis added*)

STATEMENT OF THE CASE

On April 6, 2008, Erick Davila shot at a gang rival multiple times but missed. Sadly, the bullets he fired hit and killed a grandmother and young girl. The defense argued that Davila only intended to shoot his rival, and therefore was not guilty of capital murder (as multiple intents to kill were necessary for a capital murder conviction). Although the jury seized upon this argument, as shown by questions submitted to the court during deliberations, the jury was improperly instructed as to Texas's transferred intent law in the capital murder context, and Davila was convicted.

I. GUILT AND INNOCENCE, A QUESTION OF INTENT, AND AN ERRONEOUS JURY CHARGE.

In Texas, a person can be found guilty of capital murder for intentionally killing more than one person during the same criminal transaction. Tex. Penal Code § 19.03(a)(7)(A). However, one must have the specific intent to commit two murders to be guilty of this offense; it is not enough that a person attempted to murder a single person, and accidently killed two. *See Roberts v. State*, 273 S.W.3d 322, 330 (Tex. Crim. App. 2008).

Davila's defense counsel argued from the start that the most important issue for the jury would be intent. 14 RR 16. Specifically, in their opening statement, defense counsel asked the jury to pay close attention to whether or not "Erick had the specific intent to kill these two folks, intentionally or knowingly." *Id.* at 17. The defense theme continued through closing, when defense counsel once again argued

that Erick was attempting to shoot only his rival, Jerry Stevenson, with whom he'd had previous confrontations. *See, e.g.*, 20 RR 22.

A. The shooting

On April 6, 2008, 47-year-old Annette Stevenson hosted a birthday party for her granddaughter Nautica at her residence in the Village Creek Apartments[1] in Fort Worth, Texas. 14 RR 19–21; 15 RR 42–44. Nautica's sister, brothers and several of their young cousins and friends attended the party. 14 RR 20–22; 15 RR 40, 43–44. Annette's son, Jerry Stevenson, his five-year-old daughter, Queshawn, and his three-year-old son were also in attendance. 14 RR 21, 24; 15 RR 44, 48, 54–55. Jerry Stevenson (a.k.a. Dunna, or Big Boy Dooney) was the only adult male at the house. 15 RR 42–43.

The Village Creek Apartments were known as "Blood" territory. *See, e.g.*, 14 RR 189. Indeed, Davila was a member of the Truman Street Bloods gang. 16 RR 54–64. As for Jerry Stevenson, he testified that he was not a gang member, but that he hung around many gang members. 15 RR 92–95. Specifically, he had friends who were Polywood Crips. *Id.* at 72. Stevenson recognized that the house where he lived (the scene of the shooting), was probably identified as a Crip house. *Id.* at 92–95. He further acknowledged that it could lead to problems when Crips and Bloods lived in the same area of town. *Id.*

There had been trouble just a few weeks before the shooting. Jerry Stevenson, Little Garry (Stevenson's nephew), and Jeremy (Stevenson's brother) were at

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[1] The Village Creek Apartments consist of blocks of small single family homes or townhomes.

Stevenson's mother's house when two other men arrived and an altercation broke out. *Id.* at 73-75. At one point, one of the two men had threatened to shoot Garry. *Id.* at 75. Jerry Stevenson intervened and separated the parties. *Id.* at 75–76. He recognized one of the two men arguing with his cousin as "Mike-Mike," but he did not recognize the other person. *Id.* at 76–77. However, a security guard working at complex did recognize Davila as one of the men arguing with Stevenson. 19 RR 77–78. Stevenson also admitted that the men he was arguing with were associated with the Bloods gang. 15 RR 76–77.

On the evening of April 6, there was another birthday party going on in the apartment complex. 14 RR 55, 122–23, 241. Yvonne Watts, who lived one street over was hosting a party for her daughter. 14 RR 241. Kent Reed, his wife Arlette Keys, her 15-year-old brother Eghosa Ogierumwense, and Arlette's mother, Charlene Ogierumwense, along with several other teenagers and children, celebrated inside and outside the Watts' residence. 14 RR 55, 59–60, 122–23, 126, 240–42.

At approximately 7:30 p.m., Kent, Arlette, and Eghosa saw a black Mazda drive up and briefly stop on Luther Court. 14 RR 61, 68–69, 123–25, 242–43; 16 RR 53–56. All three watched as Davila exited from the vehicle carrying a rifle. 14 RR 61–65, 127–28, 242–44; 16 RR 71–72, 110–11, 123–31; 18 RR 140–42. Another individual moved into the driver's seat and sped away.[2] 14 RR 61, 140. Davila walked past Kent and Eghosa toward the home of a woman known as "Miss Sheila," where he stopped

[2] This person was Garfield Willis Thompson, whose capital murder charge was ultimately dismissed when he plead to a different aggravated robbery.

briefly before proceeding in the direction of the birthday party on Anderson Street. 14 RR 63, 66, 76, 130–40, 246.

Eghosa followed Davila. *Id.* at 132–34. He testified that he watched Davila stop at the corner of a house across the street from 5701 Anderson. *Id.* at 134–136. There were children outside of the house, Granny (Annette Stevenson) was on the porch, and Dooney (Jerry Stevenson) was outside. *Id.* at 136–37. Eghosa initially saw a red beam from the rifle shinning on Dooney, at which point Dooney turned around and went into the house. *Id.* at 138. Then Davila started shooting the gun. *Id.* There were women and children outside when Davila started shooting, but Eghosa never saw the beam on any of them. *Id.* Davila then ran to the middle of the street, shot again, and jumped in a car and drove off. *Id.* at 140–141. On cross examination, Eghosa explained that after Dooney walked into the house, the shooter started shooting at the house. *Id.* at 157. Shots were going everywhere. *Id.*

Annette and Queshawn Stevenson had both been fatally shot. 14 RR 142–43; 18 RR 265–78. Cashmonae, Nautica, Brianna Scott, and Sheila Moblin all suffered non-life-threatening injuries. 14 RR 26–28; 15 RR 257, 259.

B. Davila's Clinically Bad Eyesight

To support the lack of intent defense trial counsel introduced evidence showing that Davila had extremely poor eyesight. Davila was not wearing glasses at the time of the shooting. 14 RR 120. His girlfriend explained that he did not have glasses at the time of shooting, but that he needed them. 16 RR 97. An optometrist who evaluated him confirmed Davila's poor eyesight. 19 RR 91–92, 97–99. Specifically, the

prescription for Davila's right eye was 20/140, and 20/80 for the left eye. *Id.* The shooting had taken place at distances of 84 feet and nearly 100 feet from the house. 15 RR 152, 19 RR 124.

C. The jury seized on the "single intent" argument, but was given an improper jury charge virtually ensuring a capital murder conviction.

After the close of evidence, in the guilt and innocence phase, the court held the customary charge conference with the parties. 19 RR 137–159. All agreed that Davila was entitled to an instruction for the lesser included charge of murder. *Id.* at 141–43. The court instructed the jury on the lesser included offenses of murder for both Queshawn Stevenson and Annette Stevenson. *CR* at 1923–29. The defense also requested a manslaughter charge, which was given over an objection from the state. 19 RR 147–48; CR at 1923–1929.

The state never requested a transferred intent instruction as allowed by Texas Penal Code § 6.04. 19 RR 137–159. The jury was given the following instruction related to capital murder:

> **Now, If you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, In Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did Intentionally or knowingly cause the death of an Individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.**

CR at 1924 (Appendix E). The charge was given to the jury at the beginning of the day on February 19, 2009. *Id.*

In the middle of the afternoon, after the jury had been deliberating for four hours, the jury sent the following note to the judge: "In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others." *Id.* at 1931 (Appendix E). The judge responded with a misleading instruction, which did not clarify that Davila must have intended to kill two distinct people before he could be convicted of capital murder.

The Court gave the following additional charge:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, armed, or otherwise affected.

CR at 1933 (Appendix E). The defense objected to giving the jury this charge, but the objection was overruled. 20 RR 53. After receiving the incorrect charge, the jury quickly returned a guilty verdict for capital murder. CR at 1934 (Appendix E).

Davila's direct appellate counsel failed to raise this incorrect jury charge argument on direct appeal.

D. Direct appeal counsel failed to raise the jury charge claim.

Had Davila's appellate counsel raised the charge error claim on direct appeal his conviction would have been reversed. In Texas, "[t]he manner in which appellate courts analyze jury charge error is prescribed in article 36.19 of the Code of Criminal Procedure." *Heins v. State*, 157 S.W.3d 457, 460 (Tex. App.—Houston [14th Dist.] 2004, no pet.). A reviewing court first determines whether error exists in the charge, and then must determine whether the error caused harm sufficient to require

reversal. *Id.* If error was properly preserved "charging error will be affirmed only if no harm has occurred." *Murphy v. State*, 44 S.W.3d 656, 665–66 (Tex. App.—Austin 2001). As explained above, error existed in the charge because it permitted the jury to convict Davila even if the jurors believed that he intended only to harm Jerry Stevenson.

Clearly, an erroneous jury charge that precludes a defendant's sole defense harms a defendant. As *any harm at all* from this charging error would have required reversal, Davila's case would have been reversed had this issue been raised on appeal.

However, even if the objection lodged by defense counsel was not sufficient to specifically cover the charging error, relief would still have been granted. In Texas, failure to properly preserve jury charge error does not preclude review, but changes the degree of harm necessary for reversal. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)). If the charging error was not preserved at the trial court level, a greater degree of harm, egregious harm, is required. *Id.* The egregious harm standard is met in cases like Davila's, where the jury charge error goes "to the basis of the case and vitally affect[s] appellant's defensive theory." *Heins v. State*, 157 S.W.3d 457, 461 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Almanza*, 686 S.W.2d at 172). The jury's note and the timing of its verdict shows that its decision clearly hinged on the requisite intent. The harm of this charging error—going directly to the sole defensive issue—was magnified by the fact that the jury immediately relied upon it to find Davila guilty.

Davila's appellate counsel was ineffective for failing to raise this jury charge error on direct appeal. Further, because the outcome of appeal is called into question by counsel's failure to raise this issue, Davila definitively establishes that he was palpably harmed by his appellate counsel's deficient performance.

E. State writ counsel failed to raise the ineffective assistance of appellate counsel claim.

Davila's state writ attorney, David Richards, failed to timely file a writ. Writ CR at 358–60. Luckily, the Texas Court of Criminal Appeals permitted an additional 180 days to file. *Id.* at 361–62. Counsel filed an 18–page writ on August 29, 2011, merely appending a mitigation report compiled by Mitigation Investigator Toni Knox.

On July 2, 2012, the trial court held a hearing on a *Wiggins* ineffective assistance of counsel claim. *See* 2 Writ-RR 1. According to an affidavit from Toni Knox, Richards did not contact her concerning the hearing until late June 2012. ROA.312-314. When they spoke on the phone on June 24, Richards did not have a copy of her report. *Id.* Knox did not feel Richards was prepared for the hearing. *Id.*

The first time that Knox met with Richards was on the date of the hearing. *Id.* They met for one hour, much of which was spent with Knox speaking with the prosecutors while Richards ordered lunch. *Id.* Knox believed that Richards was not familiar with her report, and that he made no effort to call any of the potential mitigation witnesses she had discovered. *Id.* She believed that Richards had been having health issues around the time he was working on Davila's writ, and that his impairment diminished his ability to represent Davila. *Id.*

Davila asserts that Richards was ineffective for not raising a clearly meritorious claim ineffective assistance of appellate counsel claim.

F. Federal Habeas

Davila's federal petition raised the ineffective assistance of appellate counsel claim. Although this claim was not raised in Davila's state writ, Davila argued that any potential procedural default should be excused because the principles of *Trevino* and *Martinez* apply straightforwardly to ineffective assistance of appellate counsel claims defaulted on account of ineffective state habeas counsel. ROA.475-481; ROA 223-227.

The revised Panel Opinion issued May 31, 2016, explained that the *Martinez/Trevino* exception does not apply to ineffective assistance of appellate counsel claims under Fifth Circuit authority:

> The district court rejected Davila's argument that *Martinez v. Ryan*, —U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, —— U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), should extend to excuse ineffective assistance of appellate counsel claims that are defaulted due to state habeas counsel's ineffectiveness. We have addressed this possible extension of *Martinez* in at least one precedent, where we wrote that if the petitioner was "suggest[ing] that his ineffective-assistance-of-appellate-counsel claims also should be considered under *Martinez*, we decline to do so." *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014). We do not interpret the court's declining to consider the issue to have been based on discretion.
>
> . . .
>
> In light of this controlling precedent from our court, reasonable jurists at least in this circuit would not debate the district court's conclusion that this claim of error arising from the response to the jury note was

> procedurally defaulted because Davila failed to exhaust it in state court proceedings.

Davila v. Davis, 15-70013, 2016 WL 3171870, at 4 (5th Cir. May 26, 2016)

II. DAVILA HAS CONSISTENTLY ARGUED THAT TEXAS' SENTENCING SCHEME VIOLATES THE SIXTH AMENDMENT.

A necessary finding for a sentence of death is that there are not "sufficient mitigating . . . circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." CR at 1936 (Appendix F); Tex. Crim. Proc. Code Ann. § art. 37.071(e)(1). As this finding is a necessary component for a sentence of death the Sixth Amendment requires that the finding be made by a jury and beyond a reasonable doubt, however, no burden of proof is assigned to this finding. Davila first made this argument by pre-trial motion, which was denied by the trial court. CR at 74-77.

The issue was then raised before and summarily denied by the Texas Court of Criminal Appeals: "In his fourteenth point of error, appellant asserts that the trial judge erred in overruling his motion to instruct the jury that the State bears the burden of proof concerning the lack of mitigating evidence. We have repeatedly rejected this argument." *Davila v. State*, AP-76,105, 2011 WL 303265, at *10 (Tex. Crim. App. Jan. 26, 2011).

Davila raised the issue once again in his Federal Writ of Habeas Corpus, and the Fifth Circuit upheld the District Court's denial of the claim:

> Davila argues that Article 37.071 is unconstitutional under the Sixth Amendment because it does not place the burden on the State to prove

a lack of mitigating evidence beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This claim was rejected by the Texas Court of Criminal Appeals. The district court rejected relief on this claim based on our precedent. *See Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005).

Davila, in a letter directing us to recent relevant authority, cites to the decision in *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). There, the Supreme Court held that Florida's capital sentencing scheme violated *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556. Under the Florida scheme, a jury makes an advisory verdict while the judge makes the ultimate factual determinations necessary to sentence a defendant to death. *Hurst*, 136 S.Ct. at 621–22. The Court held that procedure was invalid because it "does not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Davila recognizes that Texas does require jurors to make all factual determinations necessary for a death sentence. His argument is that the scheme is unconstitutional because jurors do not have to find the absence of mitigating circumstances beyond a reasonable doubt. Our precedent precludes this claim. *Rowell*, 398 F.3d at 378. Reasonable jurists would not debate the district court's resolution, even after *Hurst*. *See Avila v. Quarterman*, 560 F.3d 299, 315 (5th Cir. 2009).

Davila v. Davis, 15-70013, 2016 WL 3171870, at *8 (5th Cir. May 26, 2016)

ARGUMENT: REASONS FOR GRANTING RELIEF

I. DOES THE RULE ESTABLISHED IN *MARTINEZ V. RYAN*, 132 S.CT. 1309 (2012) AND *TREVINO V. THALER*, 133 S. CT. 1911, 1921 (2013), THAT INEFFECTIVE STATE HABEAS COUNSEL CAN BE SEEN AS CAUSE TO OVERCOME THE PROCEDURAL DEFAULT OF A SUBSTANTIAL INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM, ALSO APPLY TO PROCEDURALLY DEFAULTED, BUT SUBSTANTIAL, INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS?

A. *Martinez* and *Trevino* apply to procedurally defaulted ineffective assistance of appellate counsel claims.

The Ninth Circuit has stated the issue squarely: "The Court in *Martinez* did not distinguish between trial-counsel and appellate-counsel IAC." *Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013). Professors Hertz and Liebman concur:

> Although *Martinez* concerned a claim of ineffective assistance of trial counsel, and thus the Court's discussion was limited to claims of this sort . . . the Court's reasoning logically extends to other types of claims that, as a matter of state law or of factual or procedural circumstances, could not be raised before the postconviction stage.

Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.3[b] (6th ed. Supp. 2013).

Indeed, Justice Scalia recognized as much in *Martinez* when he explained that ineffective assistance of appellate counsel claims, as well as *Brady* claims and those of newly discovered exculpatory evidence, are indistinguishable from ineffective trial counsel claims for the purposes of the new exception:

> [N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised . . .

Martinez, 132 S. Ct. at 1321 (Scalia, J., dissenting).

That *Martinez* and *Trevino* necessarily apply to ineffective assistance of appellate counsel claims is not surprising based upon the reasoning behind those decisions. This is because, as the District Court recognized, such claims "do not exist to be raised on appeal" and "are logically raised, as Davila asserts, in state habeas proceedings." ROA.540.

The principles underlying *Martinez* lead to the conclusion that ineffective assistance of state habeas counsel establishes cause for a failure to raise an ineffective appellant counsel claim at the state court level. This Court has identified three factors which compel the conclusion that ineffective state habeas counsel excuses a procedural default for the failure to raise ineffective trial counsel claims. "First, the right to the effective assistance of counsel at trial is a bedrock principle in our justice system . . . Indeed, the right to counsel is the foundation for our adversary system." *Trevino v. Thaler*, 133 S. Ct. 1911 at 7 (U.S. 2013) (quotations omitted). Second, taking into account that ineffective counsel on direct appeal is cause, it only makes sense that ineffective assistance of habeas counsel should be cause for claims that cannot be raised on direct appeal. *Id.* Third, where a state channels review of certain claims into collateral proceedings, the lawyer's failure to raise those claims at the state habeas level could deprive a person of any review at all. *Id.* at 7-8.

All three factors apply straightforwardly to ineffective appellate counsel claims. This Court held over thirty years ago that "[a] first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Indeed,

Evitts v. Lucey was decided upon the intersection of the Due Process Clause found in the Fourteenth Amendment and the Sixth Amendment's right to effective counsel. 105 S.Ct. 830, 835-36 (1985). It is hard to imagine two more "bedrock principles" in our criminal justice system than Due Process and the Right to Counsel. Surely the legal parameter, to say nothing of desideratum, that we do not convict a man, or in this case, kill a man without due process of law is a bedrock principle in America. Second, seeing as ineffective assistance of appellate counsel is cause to excuse a procedural default, and seeing as it is literally impossible for someone other than state habeas counsel to raise this issue in the first instance,[3] it only makes sense that ineffectiveness of habeas counsel should excuse a petitioner's failure to raise his ineffective appellate counsel claim in state habeas proceedings. Indeed, if ineffectiveness of state habeas counsel is not cause, then quite literally, no court would ever be able to review even the most powerful ineffective appellate counsel claim when state habeas counsel failed to raise the claim. The rationale behind *Martinez* and *Trevino* apply straightforwardly to finding cause and prejudice in the instant case.

This was the same analysis used by the Ninth Circuit when they decided that *Martinez* and *Trevino* necessarily apply to ineffective assistance of counsel claims. *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013).

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[3] The state record shows that the briefing for the initial writ was filed on July 28, 2010, that the Court of Criminal Appeals denied the direct appeal on January 26, 2011, and that the state writ was not filed until August 29, 2011.

B. A Circuit-Split Has Arisen

Following *Martinez*, the circuit courts have split on the extension of *Martinez* and *Trevino* to defaulted ineffective assistance of appellate counsel claims: The Fifth, Sixth, Seventh, Eighth, and Tenth Circuits held that *Martinez* cannot be used to excuse ineffective assistance of appellate counsel claims in addition to ineffective trial counsel claims. *Long v. Butler*, 809 F.3d 299, 315 (7th Cir. 2015); *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014); *Hodges v. Colson*, 727 F.3d 517, 530-31 (6th Cir. 2013); *Banks v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012) (same); *Dansby v. Norris*, 682 F.3d 711, 728-29 (8th Cir. 2012) (same), *rev'd on other grounds*, 133 S. Ct. 2767 (2013).

By contrast, as previously noted, the Ninth Circuit held that *Martinez* can be used to excuse the default of ineffective assistance of appellate counsel claims. *Nguyen v. Curry*, 736 F.3d 1287, 1289-90 (9th Cir. 2013). It should also be noted that the Supreme Court denied certiorari to address the Ninth Circuit's extension of *Martinez*. *Hurles v. Ryan*, 135 S. Ct. 710 (2014).[4]

C. This Court should grant certiorari.

This Court should grant Davila's petition for certiorari because the Fifth Circuit's decision is "in conflict with the decisions of another United States court of appeals" on the same issue. Sup. Ct. R. 10(a). The question of whether or not

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[4] The cert petition is available at 2014 WL 4075964. The first question presented was: "can post-conviction counsel's ineffectiveness provide cause to excuse the procedural default of an ineffective-assistance-of-appellate-counsel claim, or is Martinez limited to excusing only the default of a claim of ineffective assistance of trial counsel?"

ineffective state habeas counsel's performance can be seen as cause to overcome the procedural default of a substantial ineffective assistance of appellate counsel claim is also "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Indeed, without this Court's guidance petitioners in the Fifth Circuit who were denied effective representation both on direct appeal and during their initial collateral proceedings will literally have no forum to raise substantial claims of ineffective assistance of appellate counsel.

II. IN LIGHT OF *HURST V. FLORIDA*, 136 S. CT. 616, 622 (2016), MUST TEXAS' SECOND PUNISHMENT SPECIAL ISSUE, WHICH IS A NECESSARY FINDING FOR A SENTENCE OF DEATH, BE DECIDED BY THE JURY BEYOND A REASONABLE DOUBT?

Davila could only be sentenced to death after the jury unanimously agreed on two punishment "special issues." TEX. CODE CRIM. PROC. art. 37.071 § 2 (b)–(g); Appendix F (Punishment Phase Jury Instructions). Unless the jury unanimously agreed on these special issues the trial court was required to sentence Davila to life in prison. *Id.* at § 2 (g). The constitutional deficiency is that the jury was not required to make the second finding beyond a reasonable doubt.

The recent decision *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016) makes clear that the holding of *Apprendi*: "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," applies to Texas' second special issue. 530 U.S. 466, 490. However, the Fifth Circuit and the Texas Court of Criminal Appeals have repeatedly rejected this argument based upon the fiction that Texas' special issues are not

prerequisites to a sentence of death. *See, e.g., Allen v. Stephens*, 805 F.3d 617 at 628 (5th Cir. 2015) ("[T]hrough the guilt-innocence phase, 'the state was required to prove beyond a reasonable doubt every finding prerequisite to exposing [the defendant] to the maximum penalty of death.'"); *Allen* v. State, 108 S.W.3d 281, 285 (Tex. Crim. App. 2003) (("Nothing the jury or judge decided during the punishment phase could have enhanced appellant's sentence beyond the prescribed range."). Texas and the Fifth Circuit refuse to recognize that the Sixth Amendment's guarantees apply to "each fact necessary to impose a sentence of death." *Hurst*, 136 S. Ct. at 619.

A. Texas' Capital Sentencing Scheme.

To be eligible for the death penalty in Texas a person must be convicted of murder committed in one of several specifically defined ways. *See* Tex. Pen. C. § 19.03, § 12.31. Jurors make the eligibility decision in the guilt/innocence phase of trial. *Id.* However, after a finding of guilt, but prior to the answering of the statutory special issues, the maximum punishment Davila could receive was life in prison.

Before a defendant may be sentenced to death in Texas, the jury must answer statutory special issues in a certain way. *See* TEX. CODE CRIM. PRO. art. 37.071 (Art. 37.071). Based on the jury's answer to the special issues the defendant will be sentenced to life in prison or death. *Id.* In Davila's case, only two special issues were submitted to the Jury. *See* CR at 1936-38 (Jury Instructions, also Included as Appendix F.). Pursuant to Art. 37.071, sec. 2(b), the jury was first asked the following question: "Do you find from the *evidence beyond a reasonable doubt* that there is a probability that the defendant would commit criminal acts of violence that would

constitute a continuing threat to society?" *Id.* at 1938 (Appendix F)(*emphasis added*). The jury was instructed that they could not answer this special issue "yes" unless they agreed unanimously and beyond a reasonable doubt. *Id.* at 1936 (Appendix F); *See* Tex. C. Crim. P. Art. 37.071(d)(2).

If the first special issue is answered in the affirmative the jury is instructed to answer the second special issue: "Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentenced be imposed?" CR at 1938; See also Art. 37.071(e)(1). This special issue was adopted to meet the Eighth Amendment requirement that jurors in death penalty cases be allowed to consider all mitigation evidence when considering the death penalty. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

Importantly, Davila could only be sentenced to death *after* the jury unanimously agreed on both "special issues." TEX. CODE CRIM. PROC. art. 37.071 § 2 (b)–(g). Absent both findings, the trial court was required to sentence Davila to life in prison. TEX. CODE CRIM. PROC. art. 37.071 (g). The constitutional deficiency is that the jury was not required to make this second finding beyond a reasonable doubt.

B. *Apprendi, Ring,* and *Hurst* require a finding that Texas' capital punishment scheme violates the Sixth and Fourteenth Amendments.

In *Apprendi*, this Court considered a New Jersey statute which permitted a judge to add a "hate crime" enhancement upon finding, by a preponderance of the evidence, that the crime was motivated by racial animus. 530 U.S. at 469-470. This Court held New Jersey's "hate crime enhancement" unconstitutional because it permitted a judge, acting alone and using only a preponderance standard, to enhance the possible punishment for a crime outside the normal statutory range. The Court drew on its earlier statement in *United States v. Jones*, 526 U.S. 227, 243 n.6 (1999), that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." The Court dismissed New Jersey's argument that the hate-crime finding was merely a "sentencing factor" as semantics: "Merely using the label 'sentence enhancement' to describe the [finding] surely does not provide a principled basis" for treating it differently than the substantive elements of the crime. *Id.* at 476.

In *Ring v. Arizona,* 122 S. Ct. 2428 (2002), this Court applied *Apprendi* in the capital sentencing context. The Court drew a simple rule from *Apprendi*: "If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt." *Id* at 2430 (*citing Apprendi,* 530 U.S. at 482-83).

The Court accordingly struck down the Arizona statute which permitted a judge alone to make fact findings essential to the imposition of the death penalty. *Apprendi* and *Ring* teach that courts must look not to the "form" but the "effect" of statutory aggravating factors. The *Ring* Court stressed that there was simply no difference between a substantive element of the offense and a "sentencing factor," so long as that sentencing factor served to elevate the maximum permissible punishment. *Id.* at 2441. Therefore, a "sentencing factor" which makes the defendant eligible for a more severe punishment than "the maximum authorized by a guilty verdict standing alone" is simply "the functional equivalent of an element of a greater offense" and therefore must be proven in accordance with the procedures developed for ensuring a fair and impartial decision as to the defendant's guilt. *Id.* at 2443 (quoting *Apprendi*, 530 U.S. at 494 n.19).

Under *Ring* and *Apprendi*, both of the factual findings set out in TEX. CODE CRIM. PROC. art. 37.071 are not mere sentencing factors. When a defendant is convicted of capital murder in Texas the maximum punishment authorized by law is life imprisonment. *Id.* For this reason, the maximum sentence based solely on a finding of guilt in a capital murder trial is life in prison. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004) ("Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*") If the State seeks death, it must prove future dangerousness, and must also prove that the defendant's mitigation facts are insufficient to justify a life

sentence and both findings must be made by a jury beyond a reasonable doubt. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).[5]

Under the Texas scheme, the jury must answer the mitigating special issue *in order to determine whether or not a death sentence will be imposed.* Although its subject matter is "mitigation," what is important, as this Court emphasized, is the "effect" of the fact-finding, not its form.[6] Functionally, the mitigation special issue operates precisely like an element of the crime - that is to say, it determines what sentence the defendant will receive. It must be determined by a process that meets relevant Constitutional standards, and *Ring Apprendi*, and *Hurst* hold that this includes a jury that is convinced beyond a reasonable doubt. *See also Sullivan v.*

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[5] The idea that *Apprendi* applies to all findings necessary for a sentence of death was further cemented in *Hurst v. Florida* where this Court held that the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. 616, 619 (2016). Of course, the Sixth Amendment does not only require that jury make all necessary findings, it also requires that the finding be made beyond a reasonable doubt. *Id.* at 621 (The Sixth Amendment "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.").

[6] The fact that the mitigation special issue is mandated by the Eighth Amendment does not remove it from the Fifth and Sixth or Fourteenth Amendment analysis:

> The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence ... is without precedent in our constitutional jurisprudence."

Ring v. Arizona, 536 U.S. 584, 606 (2002). *See also Ring*, 536 U.S. at 612 (Scalia, J. Concurring) ("*[W]hether or not* the States have been erroneously coerced into the adoption of "aggravating factors," wherever those factors exist they must be subject to the usual requirements of the common law, and to the requirement enshrined in our Constitution, in criminal cases: they must be found by the jury beyond a reasonable doubt.).

Louisiana, 508 U.S. 275, 278 (1993) (The Due Process Clause and the Sixth Amendment require the beyond a reasonable doubt standard be used in state as well as federal proceedings.).

C. Delaware's Supreme Court agrees that all necessary findings, even those related to weighing mitigation, must be found by a jury beyond a reasonable doubt.

After this Court's decision in *Hurst* the Delaware Superior Court certified five questions to the Delaware Supreme Court in order to determine whether Delaware's capital sentencing scheme is constitutional. *See State v. Rauf*, 1509009858, 2016 WL 320094 (Del. Super. Jan. 25, 2016). One of those five questions is relevant to the issue presented here:

> If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal and state constitutional standards?

Id. Shortly thereafter, the Delaware Supreme Court accepted the certified questions, Del. Supr. No. 39, 2016, and the Superior Court stayed "all trials, penalty hearings, and applications asking [the] Court to declare Delaware's capital sentencing scheme unconstitutional." *Administrative Directive of the President Judge of the Superior Court of the State of Delaware,* Feb. 1, 2016, No.2016–2. On August 2, 2016, the Delaware Supreme Court decided that *Hurst* and its progeny require that all findings necessary for a death sentence be found by a jury and beyond a reasonable doubt. *Rauf v. State*, 39, 2016, 2016 WL 4224252, at *36 (Del. Aug. 2, 2016).

Specifically relevant here is the Court's answer to the Fourth Certified Question:

> If the finding that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist must be made by a jury, must the jury make that finding unanimously and beyond a reasonable doubt to comport with federal constitutional standards?
>
> **Yes.** We answer question four in the identical manner in which we have answered question two.

Id. at 2. After a detailed and precise history of our countries strong preference for jury control over capital punishment, and of the more recent and sometimes confounding death penalty jurisprudence, Chief Justice Strine concluded as follows:

> There is no circumstance in which it is more critical that a jury act with the historically required confidence than when it is determining whether a defendant should live or die. If, as a majority of us have concluded, the Sixth Amendment requires a jury to make all the necessary factual determinations relevant to a capital defendant's fate, there is no reason to depart from the long-standing beyond a reasonable doubt standard when the jury is making the crucial fact-laden judgment of whether the defendant should be executed.[303] Put simply, the Sixth Amendment right to a jury includes a right not to be executed unless a jury concludes unanimously that it has no reasonable doubt that is the appropriate sentence.

Id. at *36.

Davila asks this Court to intervene to ensure that Texas juries also conclude unanimously and beyond a reasonable doubt that death is the appropriate sentence.

D. The Fifth Circuit and Texas fail to recognize that both special issues are a prerequisite to a finding of death.

Historically, the Fifth Circuit has held Texas' capital sentencing procedure to be constitutional because "a finding of mitigating circumstances reduces a sentence from death, rather than increasing it to death." *Blue v. Thaler*, 665 F.3d 647, 669 (5th Cir. 2011) (citation omitted). This is the same basis relied upon by the Texas Court of Criminal Appeals in denying similar *Apprendi* claims. *See, e.g., Allen*, 108 S.W.3d at 285.

This reasoning "overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.'" *Ring v. Arizona*, 536 U.S. 584, 604 (2002) (*citing Apprendi*, 530 U.S. at 494). *Hurst* makes it abundantly clear that *Apprendi*'s holding applies to *any finding necessary for sentence of death*. And Delaware's recent decision in *Rauf* shows that *Hurst*, *Ring*, and *Apprendi* apply to any necessary finding, even if it involves mitigation.

The relevant test for applying *Apprendi* is whether or not the finding in question is a necessary prerequisite to a sentence of death. *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016). If a certain finding must be made prior to a death sentence being imposed, then *Apprendi* applies and the finding must be made by the jury beyond a reasonable doubt. *Id.*[7] Because Texas' second special issue must be decided in the

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[7]. In *Hurst* the analysis was straightforward:

> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own

negative prior to a sentence of death being imposed, that finding must be made by a jury beyond a reasonable doubt. Texas' ruling is contrary to clearly established federal law because the state court confronted a set of facts materially indistinguishable from those in *Ring* and nevertheless arrived at a different result. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000) (discussing the standards of 28 U.S.C. 2254(d)). Further, Texas' decision was an unreasonable application of clearly established federal law because although the Court of Criminal Appeals correctly identified the governing legal rule it applied the rule unreasonably in Davila's case. *Id.* at 407-08.

E. Appellate courts are split about whether the Sixth Amendment applies to the selection phase of capital trials.

Multiple jurisdictions have recently commented on whether or not a defendant is entitled to the protection of the Sixth Amendment during the selection phase of a capital trial.

The Alabama Court of Criminal Appeals makes a distinction between aggravating factors and mitigation factors when applying *Apprendi*. *Ex parte State*, CR-15-0619, 2016 WL 3364689, at *8 (Ala. Crim. App. June 17, 2016). The Court believes that because the jury in Alabama must find an aggravating factor beyond a reasonable doubt, that any further findings only decrease the potential sentence and

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> fact-finding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.

Hurst v. Florida, 136 S. Ct. 616, 622 (2016).

therefore additional findings may be made by a judge. Indeed, that Court specifically found that the weighing of mitigation is not effected by the *Hurst* decision. *Id.* ("Whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact necessary to make a capital defendant eligible for the death penalty but is a 'moral or legal judgment' guiding the trial court's discretion in determining 'whether a defendant eligible for the death penalty should in fact receive that sentence.'") Interestingly, a few days before the *Ex parte State* ruling, this Court had granted certiorari, vacated a judgment, and remanded a case back to the Court of Criminal Appeals "for further consideration in light of *Hurst v. Florida*, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016)." *Kirksey v. Alabama*, 136 S. Ct. 2409, 195 L. Ed. 2d 777 (2016); *see also Wimbley v. Alabama*, 136 S. Ct. 2387, 195 L. Ed. 2d 760 (2016) (same); *Brooks v. Alabama*, 136 S. Ct. 708, 193 L. Ed. 2d 812 (2016) (J. Sotomayor concurring in denial of certiorari but noting that the decisions upholding Alabamas capital scheme were overruled by *Hurst*.)

The Supreme Court of Ohio agrees that *Ring*, *Apprendi*, and *Hurst* only apply to the eligibility phase of a capital trial, and that the subsequent weighing process can therefore be performed by a judge. *State v. Belton*, 2016-Ohio-1581, ¶ 59 ("Because the determination of guilt of an aggravating circumstance renders the defendant eligible for a capital sentence, it is not possible to make a factual finding during the sentencing phase that will expose a defendant to greater punishment.") Ohio relies upon the same logic as Texas and believes that "if a defendant has already been found to be death-penalty eligible, then subsequent weighing processes for

sentencing purposes do not implicate *Apprendi* and *Ring*. Weighing is not a fact-finding process subject to the Sixth Amendment, because '[t]hese determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibility determination.'" *Id.* at ¶ 60. Texas and Ohio both overlook the fact that absent a finding that aggravating factors outweigh mitigating factors the maximum sentence is life in prison.

California, like Texas, takes the position that the Sixth Amendment does not require the jury to find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt. *See, e.g., People v. Rangel*, 62 Cal. 4th 1192, 1234, 367 P.3d 649, 681 (2016). *See also United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) (discussing the federal death penalty scheme and ruling that the weighing of aggravating and mitigating evidence is not a finding, but a process, and therefore no burden of proof is required.)

The State of Missouri however sides with Delaware and believes that the weighing of aggravating and mitigating evidence (along with other necessary findings) are "factual findings that are prerequisites to the trier of fact's determination that a defendant is death-eligible." *See State v. Whitfield*, 107 S.W.3d 253, 261 (Mo. banc 2003); *see also McLaughlin v. Steele*, 4:12CV1464 CDP, 2016 WL 1106884, at *27 (E.D. Mo. Mar. 22, 2016) (discussing the Missouri death penalty scheme and finding that the petitioner was entitled to habeas relief where his death sentence by state court judge was based on findings of fact not made by jury in violation of his Sixth Amendment right to jury trial).

F. This Court should grant the petition for writ of certiorari

This Court should grant the petition for writ of certiorari because the Texas Court of Criminal Appeals and the Fifth Circuit have repeatedly decided an important question of federal constitutional law in way that conflicts with this Court's relevant decisions in *Apprendi*, *Ring*, and *Hurst*. Sup. Ct. R. 10(c). Further, the decisions of Texas' Court of Criminal Appeals and the Fifth Circuit are now at odds with those of the Supreme Courts of Delaware and Missouri. Sup. Ct. R. 10(a), (b). This Court should grant certiorari to establish whether or not the Sixth Amendment applies to the selection phase of capital trials.

CONCLUSION

This Court should grant the petition and order merits review.

Respectfully submitted this 22nd day of September 2016.

By: _____
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1[illegible]-[illegible]210

CERTIFICATE OF MAILING

I hereby certify that, on the 22nd day of September 2016, this pleading was served on the Court via mail courier.

Seth Kretzer

CERTIFICATE OF SERVICE

I hereby certify that, on the 22nd day of September 2016, a true and correct copy of this petition and appendices was sent to AAG Katherine Hayes in the Office of the Texas Attorney General.

Seth Kretzer

SHIP DATE: 22SEP16
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BILL SENDER

CAPITAL CASE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ERICK DAVILA,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

Appendix

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Appendix Description

Appendix A - *Davila v. Davis*, 15-70013, 2016 WL 3171870 (5th Cir. May 26, 2016)

Appendix B - *Davila v. Stephens*, 2015 WL 1808689; 2015 U.S. Dist. LEXIS 51854 (N.D. Tex. 2015)

Appendix C - State habeas court's Findings of Fact and Conclusions of Law

Appendix D - *Davila v. State*, No. AP-76,105, 2011 WL 303265; 2011 Tex. Crim. App. Unpub. LEXIS 43 (Tex. Crim. App. 2011) (Jan. 26, 2011)

Appendix E- Guilt and Innocence phase jury instructions and jury questions

Appendix F – Punishment phase jury instructions

CERTIFICATE OF SERVICE

I hereby certify that, on the 22nd day of September 2016, a true and correct copy of this motion was mailed by first-class U.S. mail to:

AAG Katherine Hayes
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Seth Kretzer

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2016 WL 3171870
Only the Westlaw citation
is currently available.
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure
32.1 generally governing citation
of judicial decisions issued on or
after Jan. 1, 2007. See also U.S.Ct.
of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals,
Fifth Circuit.

Erick Daniel Davila,
Petitioner–Appellant
v.
Lorie Davis, Director, Texas
Department of Criminal Justice,
Correctional Institutions
Division, Respondent–Appellee.

No. 15-70013
|
FILED May 26, 2016
|
REVISED May 31, 2016

Synopsis

Background: Petitioner, convicted in state court of capital murder and sentenced to death, sought habeas relief. The United States District Court for the Northern District of Texas, Reed O'Connor, J., 2015 WL 1808689, denied relief. Petitioner sought certificate of appealability (COA).

Holdings: The Court of Appeals held that:

[1] petitioner was not entitled to COA on claim that there was insufficient evidence to support conviction;

[2] petitioner was not entitled to COA on claim that his appellate counsel was ineffective;

[3] petitioner was not entitled to COA on claim that his trial counsel was ineffective;

[4] petitioner was not entitled to COA on claim that his statements should have been suppressed;

[5] petitioner was not entitled to COA on claim that Texas death penalty statute violated Eighth and Fourteenth Amendments; and

[6] petitioner was not entitled to COA on claim that Texas death penalty statute violated Sixth Amendment.

Ordered accordingly.

Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:13-CV-506

Attorneys and Law Firms

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Criminal Appeals Division, Austin, TX, for Respondent–Appellee.

Before DENNIS, SOUTHWICK, and HAYNES, Circuit Judges.

Opinion

PER CURIAM: *

*1 Erick Daniel Davila was convicted of capital murder and sentenced to death. After pursuing relief in state court, he brought a Section 2254 action. The district court denied relief. He now seeks a certificate of appealability ("COA") from this court. We deny him a COA.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2009, a Texas jury found Davila guilty of capital murder. Davila had opened fire with a semiautomatic assault rifle on a birthday party at a home in Fort Worth, Texas, killing Annette Stevenson and her five-year-old granddaughter, Queshawn Stevenson. The birthday party was for another of Annette's granddaughters. All the guests were children or adult women, except for Jerry Stevenson, Queshawn's father.

Around 8:00 p.m., many guests were on the porch when a black Mazda passed by the house slowly, driven by a man with a gun. A few minutes later, Cashmonae Stevenson, an 11-year-old at the party, saw a man run in front of the house across the street and begin shooting at the guests on the porch. Panic ensued as the guests tried to get inside the house. Multiple children, including Cashmonae, and adult guests were shot and injured. Annette and Queshawn were the only ones to die from their injuries.

A police investigation led to the arrest of Davila, who gave four written statements over the course of seven hours in custody after his arrest. Davila was a member of the Bloods gang. Davila's third statement included admissions that he and his friend had been driving around in his girlfriend's black Mazda and decided to have a "shoot em up." He said that he was trying to shoot "the guys on the porch and ... trying to get the fat dude." He stated he did not know the name of the "fat dude," but recognized him.[1] As for the "guys on the porch," Davila appeared to have mistaken some adult women at the party for men because the only male at the party was Jerry. This confession, along with other evidence, was presented at Davila's trial and led to his conviction.

At the punishment phase, the State introduced aggravating evidence: Davila had attempted to escape from jail and seriously injured a detention officer in the process; he had committed an aggravated robbery and an additional murder only two days before the birthday party shooting; he also had been convicted for burglary of a habitation in 2006.

For the mitigation case, the defense offered testimony from Davila's father, sister, mother, maternal aunts, and a psychologist, Dr. Emily Fallis. In summary, they testified that Davila had been raised solely by a

teenage mother, with his alcoholic father having been incarcerated for murder since he was very young. Davila's mother told him that he was conceived when his father sexually assaulted her. She was neglectful, abusive, and hateful towards Davila and his sister, and even made them leave the house as teenagers. Davila's sister testified about physical fights she had with their mother. After deliberation, the jury returned a sentence of death.

*2 The Texas Court of Criminal Appeals affirmed Davila's conviction on direct appeal, and the United States Supreme Court denied a writ of certiorari. Davila then pursued state habeas relief. He petitioned the convicting court for a writ of habeas corpus, which was denied. He then sought a writ of habeas corpus from the Court of Criminal Appeals, which adopted the convicting court's findings and conclusions and denied relief. He again petitioned the Supreme Court for a writ of certiorari, which was denied.

Davila then sought federal habeas corpus relief under 28 U.S.C. § 2254. He presented seven constitutional claims:

1) The evidence at trial was insufficient to support his conviction;

2) He received ineffective assistance of trial counsel, appellate counsel, and state habeas counsel;

3) His written confession to this offense was erroneously admitted;

4) His written confession to a separate murder was erroneously admitted;

5) The trial court erroneously denied his motion to preclude the death penalty and declare Article 37.071 of the Texas Code of Criminal Procedure unconstitutional;

6) The trial court erroneously overruled his objection to Texas's "10-12 Rule"; and

7) The trial court erroneously instructed the jury about the burden of proof on mitigation.

In addition to his application for federal habeas relief, he sought an evidentiary hearing and a stay and abeyance to allow him to exhaust an ineffective assistance claim in state court. The district court reviewed the state court proceedings with the deference required by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), then denied habeas relief. The court also denied the motion for an evidentiary hearing and a stay and abeyance. The court did not certify any issue for appeal. Davila now seeks a COA from our court to allow him to proceed on appeal. *See* 28 § U.S.C. 2253(c)(1)(A).

DISCUSSION

We grant a COA only upon "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). When the district court denies an applicant's constitutional claims on the merits, a COA will only issue if

the applicant shows "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). When the district court denies an applicant's claims on procedural grounds, a COA will only issue if the applicant shows that reasonable jurists would debate whether the district court was correct in its procedural ruling and whether the petition states a valid claim on the merits. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

AEDPA requires federal district courts to give deference to state court decisions. *See Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005). A federal court must not grant habeas relief regarding any claim adjudicated on the merits in state court proceedings unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ... or ... resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2).

A state court's adjudication is "contrary to" Supreme Court precedent if: (1) the state court reaches the opposite conclusion from the Supreme Court on a question of law; or (2) the state court arrives at the opposite result of Supreme Court precedent in a case involving materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405–06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court's decision is "an unreasonable application" of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008). Even if we find that a state court incorrectly applied clearly established federal law, we can only correct the state court if the incorrect application was also objectively unreasonable. *Id.*

*3 A determination of facts by a state court is presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "This presumption of correctness attaches not only to explicit findings of fact, but also to 'unarticulated findings which are necessary to the state court's conclusion of mixed law and fact.' " *Pippin*, 434 F.3d at 788 (quoting *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003)).

We must conduct a "threshold inquiry into the underlying merit" of Davila's habeas claims to determine whether a COA should issue. *Miller-El*, 537 U.S. at 327, 123 S.Ct. 1029. This inquiry "does not require full consideration of the factual or legal bases" of the claims. *Pippin*, 434 F.3d at 787.

I. Sufficiency of the Evidence Claim

Davila asserts that there was insufficient evidence to support his conviction for capital murder because capital murder in Texas requires specific intent to kill more than one person. He claims the evidence showed

he only intended to kill one person: Jerry Stevenson.

The district court denied this claim because Davila's written statement evidenced intent to kill more than one person. Davila's statement included the following: "we were going to have a shoot em up ... The fat dude was in the middle of the street. The other 3 were on the porch.... I was trying to get the guys on the porch and I was trying to get the fat dude." The district court decided that the Texas Court of Criminal Appeals did not unreasonably apply clearly established federal law to assess sufficiency of the evidence, as set out in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[1] Davila argues that a COA should issue on whether his legal sufficiency claim should be analyzed under Section 2254(d)(1) or (d)(2). Davila asserts that the district court did not address his claim that the Texas Court of Criminal Appeals made unreasonable determinations of the facts under Section 2254(d)(2), but instead just analyzed his claim under Section 2254(d)(1). An applicant establishes legal error in the state court proceedings under Section 2254(d)(1), but factual error under Section 2254(d)(2). *See Lewis v. Thaler*, 701 F.3d 783, 791 (5th Cir. 2012). A claim of insufficient evidence is a mixed question of law and fact, which we review under Section 2254(d)(1). *See Miller v. Johnson*, 200 F.3d 274, 281, 286–88 (5th Cir. 2000). Accordingly, we deny a COA on this sub-issue because reasonable jurists would not debate the district court's resolution in light of our precedent.

[2] We must decide whether the Texas Court of Criminal Appeals' rejection of Davila's claim that the evidence was insufficient "was an objectively unreasonable application of the clearly established federal law" as set out in *Jackson*, 443 U.S. 307, 99 S.Ct. 2781. *See Martinez v. Johnson*, 255 F.3d 229, 244 (5th Cir. 2001). Evidence is sufficient if, viewing it in the light most favorable to the state prosecution, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. We look to state law to determine the substantive elements of the crime. *Coleman v. Johnson*, — U.S. —, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012). Murdering more than one person in the same criminal transaction qualifies as capital murder in Texas. TEX. PENAL CODE § 19.03(a)(7)(A). Murder requires "intentionally or knowingly caus[ing] the death of an individual." *Id.* § 19.02(b)(1). Under Texas law, a person is still "criminally responsible for causing a result if the only difference between what actually occurred and what he desired ... is that ... a different person ... was ... harmed." *Id.* § 6.04(b)(2).

*4 Davila's third written statement reveals an intent to kill at least four persons. Because there was only one man at the party, Jerry Stevenson, Davila mistook some of the adult women for men. Under Texas law, Davila's intent to kill four men transferred to the killing of Annette and Queshawn Stevenson. A rational juror could look at that evidence

and decide beyond a reasonable doubt that Davila intentionally or knowingly killed more than one person. Reasonable jurists would not find the district court's resolution debatable or wrong. We deny a COA on this claim.

II. Ineffective Assistance of Appellate Counsel Claim

Davila contends that he is entitled to a COA on his claim that his counsel in the direct appeal from his conviction was ineffective for failing to raise an allegedly erroneous jury instruction on appeal.

During deliberations, the jury sent this written question to the trial judge: "In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others[?]" The trial judge responded by giving the jury an instruction that for the first time tracked the Texas transferred-intent statute: "A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, harmed, or otherwise affected." This additional instruction was submitted along with another instruction repeating the definitions for "intentionally" and "knowingly." Davila's trial counsel objected to the instruction on the basis that it should not have been sent to the jury until more deliberation had occurred. Davila now claims that counsel should have argued on appeal from the conviction that the additional jury instruction incorrectly stated Texas law because he had to have specific intent to murder more than one person, but the jury charge permitted him to be convicted of capital murder even if he only intended to kill Jerry Stevenson.

Because Davila did not raise this ineffective appellate counsel claim in state habeas proceedings, the district court held it was procedurally defaulted. The district court rejected Davila's argument that *Martinez v. Ryan*, —U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, — U.S. —, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), should extend to excuse ineffective assistance of appellate counsel claims that are defaulted due to state habeas counsel's ineffectiveness. We have addressed this possible extension of *Martinez* in at least one precedent, where we wrote that if the petitioner was "suggest[ing] that his ineffective-assistance-of-appellate-counsel claims also should be considered under *Martinez*, we decline to do so." *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014). We do not interpret the court's declining to consider the issue to have been based on discretion. We must consider Section 2254 claims when they are non-defaulted, exhausted, and otherwise properly raised. Moreover, *Reed* included one citation to an opinion holding that *Martinez* made an "unambiguous holding" to the effect that "ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel." *Id.* (quoting *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013)).

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[3] In light of this controlling precedent from our court, reasonable jurists at least in this circuit would not debate the district court's conclusion that this claim of error arising from the response to the jury note was procedurally defaulted because Davila failed to exhaust it in state court proceedings. *See Blue v. Thaler*, 665 F.3d 647, 669 (5th Cir. 2011) ("Because both of Blue's arguments with respect to the burden of proof on the mitigation special issue are foreclosed by Fifth Circuit precedent, the correctness of the district court's decision to reject them is not subject to debate among jurists of reason.").

*5 [4] [5] Finally, Davila challenges the district court's resolution of his motion for a stay and abeyance and motion for an evidentiary hearing. Davila sought a stay and abeyance so he could exhaust this claim in state court. A stay and abeyance is warranted when the petitioner shows there was good cause for the failure to exhaust the claim in state court, the claim is not plainly meritless, and there is no indication the failure was for delay. *See Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir. 2010). We review the denial of a stay and abeyance for abuse of discretion. *See Rhines v. Weber*, 544 U.S. 269, 277–78, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). The district court did not abuse its discretion because this claim is meritless, as discussed above, and there was no showing of good cause. Additionally, the district court did not abuse its discretion in denying Davila's request for an evidentiary hearing under Section 2254(e). *See Clark v. Johnson*, 202 F.3d 760, 765–66 (5th Cir. 2000). Here, the record itself precludes habeas relief and thus, a hearing would not enable Davila to prove factual allegations in his petition that, if true, would entitle him to relief. *See Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). We deny a COA on this claim.

III. Ineffective Assistance of Trial Counsel Claim

Davila claims his trial counsel was ineffective in failing to make a proper investigation of his background or present a mitigation case to the jury at the punishment phase under *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). This claim was presented to the Texas Court of Criminal Appeals and rejected. The district court reviewed the state court's decision[2] and held the state court's resolution of the claim was not contrary to, or an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and subsequent caselaw. Under *Strickland*, an ineffective assistance of trial counsel claim requires deficient performance and prejudice. *Id.* at 690–92, 104 S.Ct. 2052. Deficient performance is conduct that falls below an objective standard of reasonableness. *Id.* at 688, 104 S.Ct. 2052. Counsel must conduct a reasonable investigation into a defendant's background in order to make reasonable, strategic decisions about how to present, or whether to present, the mitigation case. *See Wiggins*, 539 U.S. at 521–23, 123 S.Ct. 2527. To show prejudice, Davila must show "a reasonable probability that ... the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. To determine prejudice in the context of mitigation evidence, the reviewing court "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. Our limited review is whether reasonable jurists would debate the district court's decision that the Texas court did not unreasonably apply *Strickland* and *Wiggins*.

[6] Davila argues that his trial attorneys were deficient because they failed to hire a mitigation specialist. Davila relies on the ABA Guidelines to claim that the failure to hire a mitigation specialist was deficient performance. The ABA Guidelines are only guides, not requirements, to determine whether counsel's performance was reasonable. *See Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Here, trial counsel worked together with a clinical psychologist, Dr. Emily Fallis, to investigate and evaluate mitigation evidence. Trial counsel conducted the factual investigation into Davila's background and childhood themselves, with the help of a fact investigator, because they wanted to build relationships with potential witnesses. Counsel interviewed at least 12 family members in addition to friends and employers. Counsel obtained Davila's school records and spoke to former teachers. After conducting initial interviews, counsel would send certain persons to be interviewed by Fallis. The interviews Fallis conducted allowed her to present her testimony more effectively about the impact of Davila's upbringing and background. Counsel also had Davila examined by another psychologist, neurologist, and hired another doctor with expertise in gang activity. Trial counsel made a reasonable decision to maintain responsibility for the factual investigation and to seek the assistance of an expert, Fallis, in evaluating and presenting the mitigation evidence.

*6 Davila also argues that counsel was deficient by failing to uncover additional mitigation evidence from four extended family members identified by mitigation specialist, Toni Knox, who testified at the state habeas proceeding regarding trial counsel's deficient performance. As the district court noted, two of those individuals were contacted at the time of trial but refused to testify or were otherwise uncooperative. We agree with the district court that counsel was not deficient for leaving the uncooperative family members uncalled. Additionally, as for the other two family members, counsel was not necessarily unreasonable for failing to interview them. "Questioning a few more family members ... can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there." *Rompilla v. Beard*, 545 U.S. 374, 389, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). Based on the investigation that counsel conducted, it was reasonable to doubt that interviews with these two extended family members would result in different, new information beyond what they already had discovered.

Furthermore, regarding any possible deficient performance in failing to interview the other two witnesses whom Knox identified, the district court held that

Davila could not show prejudice. The court concluded that the mitigation evidence Knox presented from these witnesses was of the same kind trial counsel had presented: Davila's mother was neglectful and abusive towards her children. Davila claims that the uncovered mitigation evidence would have shown more details of the type of physical abuse Davila and his sister endured. As the district court noted, such an argument "comes down to a matter of degrees" and is "even less susceptible to judicial second-guessing." *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999). The additional mitigation evidence presented by Knox "was largely cumulative and differed from the evidence presented at trial only in detail, not in mitigation thrust." *See Villegas v. Quarterman*, 274 Fed.Appx. 378, 384 (5th Cir. 2008).

Additionally, when compared to the strong aggravating evidence, any incremental increase in mitigation evidence would not create "a reasonable probability that ... the result of the proceeding would have been different." *See Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. Not only were the facts of Davila's shooting of Annette and Queshawn Stevenson aggravating, but he also had a serious criminal history and had admitted to murdering another person days before the birthday party shooting. Furthermore, he attacked and seriously injured a guard while trying to escape jail prior to his trial. Finally, as the district court noted, evidence demonstrating abuse to Davila and his sister could undermine any possible mitigating effect, because his sister made different choices than Davila despite growing up in the same environment. *See Guevara v. Stephens*, 577 Fed.Appx. 364, 369 (5th Cir. 2014).

Reasonable jurists would not debate the district court's conclusion that Davila's attorneys conducted a reasonable investigation, made reasonable strategic choices, and that any other available mitigation evidence could not outweigh the aggravating evidence. We deny a COA on this claim.

IV. Suppression Issues

Davila presented four claims to the district court involving suppression of statements he made. He has grouped them together in his application for a COA. They seek suppression of Davila's oral and written statements under the Fourth, Fifth, and Sixth Amendments.

First, we address his Fourth Amendment claims. The district court held that *Stone v. Powell*, 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), prevented review of Davila's Fourth Amendment claims because Davila had an opportunity to fully and fairly litigate these in state court.

[7] Davila argues that *Stone* has never been applied by the Supreme Court in a capital case. The district court noted that panels of our court have applied *Stone* in capital cases. *See, e.g., ShisInday v. Quarterman*, 511 F.3d 514, 524–25 (5th Cir. 2007). The Supreme Court has never indicated that *Stone* does not apply in capital cases. Davila argues that AEDPA should have abrogated the rule in *Stone*. Our circuit has continued to apply

Stone after AEDPA to capital cases. *See id.*; *see also Busby v. Dretke*, 359 F.3d 708, 722–23 (5th Cir. 2004); *Balentine v. Quarterman*, 324 Fed.Appx. 304, 306 (5th Cir. 2009). In light of our binding precedent, reasonable jurists would not debate the district court's determination that *Stone* barred Davila's Fourth Amendment claims if he had a full and fair opportunity to litigate them in state court.

*7 The district court noted that Davila had moved to suppress all his oral and written statements. Prior to trial, the state court held a hearing and heard evidence on Davila's Fourth Amendment claims. The state court denied Davila's motion to suppress. Davila again raised the validity of his arrest warrant during the state trial, and the trial court denied his motion again on a different basis. On direct appeal, the Texas Court of Criminal Appeals affirmed the trial court's rulings. Jurists of reason would not debate that Davila was given a full and fair opportunity to litigate his Fourth Amendment claims. *See Janecka v. Cockrell*, 301 F.3d 316, 320–21 (5th Cir. 2002).

For his Fifth and Sixth Amendment claims, Davila argues that his written statements were not voluntary because he was in "custodial interrogation for seven hours" without anything to eat or drink and without using the restroom. This claim was presented during state habeas proceedings, and the state court resolution of it must be given AEDPA deference. Whether a confession is voluntary is ultimately a legal question, which sometimes involves subsidiary mixed issues of law and fact, and accordingly, we review it under Section 2254(d)(1). *See Barnes v. Johnson*, 160 F.3d 218, 222 (5th Cir. 1998). Any purely factual sub-questions are presumed correct, unless shown to be unreasonable determinations of fact by clear and convincing evidence. *See id.*; 28 U.S.C. § 2254(d)(2), (e)(1). To determine voluntariness, we consider the "totality of the circumstances." *Rogers v. Quarterman*, 555 F.3d 483, 491 (5th Cir. 2009). "A statement is involuntary if there existed official, coercive conduct that made it unlikely the statement was a product of the individual's free choice." *Id.*

[8] The district court determined that the state court's evaluation of the voluntariness of Davila's confession was not an unreasonable application of, or contrary to, clearly established Supreme Court precedent. The state court noted that Davila never requested food, a drink, or a restroom break while he was in custody. Davila points to no clearly established federal law that the state court unreasonably applied in deciding that these facts did not show coercive or improper activity. The district court's resolution would not be debated among jurists of reason. We deny the COA on the suppression claims.

V. Claims Regarding the Texas Death Penalty Scheme

a. Violation of the Fifth Amendment Grand Jury Guarantee

[9] Davila claims that the Texas death penalty scheme, Article 37.071 of the Texas

Code of Criminal Procedure, violates the Fifth Amendment because the special issues considered at the punishment phase are not presented to the grand jury that returns the indictment. Both the Texas Court of Criminal Appeals and the district court rejected this claim because the Fifth Amendment's guarantee to a grand jury indictment has not been extended to the states through the Fourteenth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). Reasonable jurists would not debate the district court's resolution in light of *Albright*. *See Kerr v. Thaler*, 384 Fed.Appx. 400, 402–03 (5th Cir. 2010). We deny the COA.

b. Violation of the Eighth and Fourteenth Amendments

Davila argues that Article 37.071 violates the Eighth and Fourteenth Amendments. Under Texas's death penalty statute, capital jurors first consider a future dangerousness special issue set out in the statute. TEX. CODE CRIM. PROC. art. 37.071 § 2(b)(1). The jury is instructed that it cannot answer "yes" to the future dangerousness issue unless it agrees unanimously, and cannot answer "no" unless ten or more jurors agree. *Id.* § 2(d)(2). If the jury answers "yes" to the future dangerousness special issue, the jury is to answer a mitigation special issue that also is in the statute. *Id.* § 2(e)(1). For that special issue, the jurors are instructed that they cannot answer "no" unless they all agree and cannot answer "yes" unless ten or more jurors agree. *Id.* § 2(f)(2). This system is called the "10-12 Rule." *Alexander v. Johnson*, 211 F.3d 895, 897 (5th Cir. 2000). The judge is to sentence the defendant to death if the jury answers the future dangerousness issue "yes" and the mitigation issue "no." TEX. CODE CRIM. PROC. art. 37.071 § 2(g). If the jury answers "no" to the future dangerousness issue, "yes" to the mitigation issue, or "is unable to answer" either issue, then a life sentence results. *Id.*; *see also Blue*, 665 F.3d at 669 (explaining TEX. CODE CRIM. PROC. art. § 37.071). Neither the court nor the parties may inform jurors that their failure to agree on an answer will result in a life sentence. *See* TEX. CODE CRIM. PROC. art. 37.071 § 2(a)(1), (g).

*8 First, Davila claims the 10-12 Rule misleads the jury on its role in the sentencing process because the jury is not told "a single juror is statutorily permitted to cause a sentence of life" by preventing unanimous agreement to the future dangerousness special issue. He argues the Texas death penalty statute, therefore, runs afoul of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). We have already rejected this argument. *See Druery v. Thaler*, 647 F.3d 535, 544 (5th Cir. 2011).

Second, he claims that the 10-12 Rule violates his right to individualized sentencing under *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). Davila asserts that a reasonable juror could believe that his vote on the sentencing special issues is meaningless unless enough jurors agree with him because there is no instruction on

the effect of a lack of unanimity. We have also rejected this claim. *See Reed*, 739 F.3d at 779.

[10] Davila argues that the post-1991 Texas death penalty scheme, which now includes a true mitigation special issue under *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), has not been squarely addressed by our court. Yet, we have considered the 10-12 Rule since the 1991 changes to Article 37.071 and have held that the mitigation special issue does not violate *Mills* or *McKoy*. *See Allen v. Stephens*, 805 F.3d 617, 624, 631–33 (5th Cir. 2015). The Texas death penalty scheme does not create the possibility that reasonable jurors would think they all had to agree on particular mitigating evidence like the statute in *Mills* did; instead, each juror can independently consider mitigating evidence. *See* 486 U.S. at 384, 108 S.Ct. 1860; *see also Druery*, 647 F.3d at 543 & n.5. We have also held that this argument is barred by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *See Hughes v. Dretke*, 412 F.3d 582, 594 (5th Cir. 2005). Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

c. Violation of the Sixth Amendment Right to Proof Beyond a Reasonable Doubt

Finally, Davila argues that Article 37.071 is unconstitutional under the Sixth Amendment because it does not place the burden on the State to prove a lack of mitigating evidence beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This claim was rejected by the Texas Court of Criminal Appeals. The district court rejected relief on this claim based on our precedent. *See Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005).

[11] Davila, in a letter directing us to recent relevant authority, cites to the decision in *Hurst v. Florida*, — U.S. —, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). There, the Supreme Court held that Florida's capital sentencing scheme violated *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556. Under the Florida scheme, a jury makes an advisory verdict while the judge makes the ultimate factual determinations necessary to sentence a defendant to death. *Hurst*, 136 S.Ct. at 621–22. The Court held that procedure was invalid because it "does not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Davila recognizes that Texas does require jurors to make all factual determinations necessary for a death sentence. His argument is that the scheme is unconstitutional because jurors do not have to find the absence of mitigating circumstances beyond a reasonable doubt. Our precedent precludes this claim. *Rowell*, 398 F.3d at 378. Reasonable jurists would not debate the district court's resolution, even after *Hurst*. *See Avila v. Quarterman*, 560 F.3d 299, 315 (5th Cir. 2009).

*9 * * *

We DENY the COA as to all claims. All pending motions are denied.

All Citations

--- Fed.Appx. ----, 2016 WL 3171870

Footnotes

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1 Jerry Stevenson testified that neither he nor anyone who lived at Annette Stevenson's house was associated with the rival Crips gang, although he had friends who were Crips. A few weeks before this shooting, Stevenson had intervened in an argument that occurred in front of Annette's house between some of his family members and members of the Bloods gang. A security guard who witnessed the argument testified that Davila was one of the men with whom Stevenson was arguing.

2 To the extent that Davila argues the district court was not limited to the state habeas court's record under *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), because he claims his state habeas counsel was ineffective, we reject that claim. *See Escamilla v. Stephens*, 749 F.3d 380, 394–95 (5th Cir. 2014); *Ross v. Thaler*, 511 Fed.Appx. 293, 305 (5th Cir. 2013).

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70013

ERICK DANIEL DAVILA,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING EN BANC

(Opinion 5/26/16 , 5 Cir., _____, _____ F.3d _____)

Before DENNIS, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel

Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

2015 WL 1808689
Only the Westlaw citation
is currently available.
United States District Court,
N.D. Texas,
Fort Worth Division.

Erick Daniel DAVILA, Petitioner,
v.
William STEPHENS, Director,
Texas Department of Criminal
Justice, Correctional Institutions
Division, Respondent.

Civil Action No. 4:13–CV–506–O.
|
Signed April 21, 2015.

Attorneys and Law Firms

Seth Kretzer, Law Office of Seth Kretzer, Houston, TX, Jonathan David Landers, Houston, TX, for Petitioner.

Katherine D. Hayes, Office of the Texas Attorney General, Austin, TX, for Respondent.

MEMORANDUM OPINION AND ORDER

REED O'CONNOR, District Judge.

***1** Erick Daniel Davila ("Davila") petitions the Court for a writ of habeas corpus, contending that his conviction and death sentence are unconstitutional because (1) the evidence adduced at trial was insufficient to support his conviction; (2) he was denied effective assistance of counsel at trial, on direct appeal, and at state habeas proceedings; (3) the trial court erred by admitting his three written statements admitting to the commission of the offense of capital murder; (4) the trial court erred by admitting his written statement admitting to the commission of an extraneous murder offense; (5) the trial court erred by denying Davila's Motion to Preclude the Death Penalty as a Sentencing Option and Declare Tex.Crim. Proc.Code 37.071 Unconstitutional; (6) the trial court erred by overruling Davila's objection to Texas's "10–12 Rule"; and (7) the trial court erred by incorrectly instructing the jury regarding the burden of proof on the mitigation issue. Having reviewed the record, the briefs, and the exhibits tendered by the parties, the Court concludes that Davila is not entitled to relief under the standards prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), DENIES the petition, and DISMISSES this action with prejudice.

I. BACKGROUND

In February 2009, Davila was convicted and sentenced to death for the 2008 murder of an elderly woman, Annette Stevenson, and her grandchild, Queshawn Stevenson, in Tarrant County, Texas. *State v. Davila*, No. 1108359D (Crim. Dist. Ct. No. 1, Tarrant Co., Tex. Feb. 27, 2009). The Texas Court of Criminal Appeals ("CCA") affirmed the conviction in an unpublished opinion on direct appeal. *Davila v. State*, No. AP–76,105, 2011 WL 303265 (Tex.Crim.App.2011). The Court

takes the following recitation of facts from that opinion:

> On April 6, 2008, eleven-year-old Cashmonae Stevenson, along with numerous friends and relatives, celebrated her sister Nahtica's ninth birthday at a "Hannah Montana" birthday party at her grandmother's home in the Village Creek Townhouses in Fort Worth. Except for Cashmonae's uncle, Jerry Stevenson, all of the guests were women and children. About 8:00 p.m., just as the fifteen children were eating ice cream and cake on the front porch, Cashmonae saw a black Mazda slowly drive by. Inside was a man holding a gun with "a red dot" on it. Cashmonae "felt in her stomach" that something bad was going to happen because "no one ever rolled by with a gun pointed towards our house." Her uncle Jerry said, "The fool has a K in the car." And then Cashmonae heard her grandmother, Annette Stevenson, say, "They trying to find trouble."
>
> A few minutes later Cashmonae saw a man run across the field, stand next to the house in front of theirs, and start shooting with "the red dot" pointed at their porch. He kept shooting at them as the children and adults "stacked up on top of each other" as they tried to run through the front door. They were all screaming and trying to get to safe places inside. Cashmonae saw her uncle, Jerry Stevenson, lay his five-year-old daughter, Queshawn, down on the sofa. She was bleeding and looked dizzy. According to Jerry, "her guts was hanging out." After the gunshots ended, Cashmonae discovered that she had been shot in the elbow, the hand, and the shoulder. Nahtica and another little girl, Brianna, as well as Sheila Moblin, one of the adults at the party, had also been shot. Cashmonae's grandmother, Annette, had been killed, as had five-year-old Queshawn.
>
> *2 ...
>
> By the time the first police officer arrived, it was a chaotic scene. There was a dead woman-Annette Stevenson-in the back bedroom, a seriously injured child-Queshawn-on the couch in the living room, two more children with leg wounds in the dining room, blood splattered everywhere, and both adults and children screaming and trying to help or console the wounded and each other. Crime scene officers found four shell casings beside the air conditioning unit across the street and four more scattered in the street where the second series of shots had been fired. They photographed the bullet holes found all along the porch walls and in the windows of the Stevenson home.

Id. at *1–3. Following his appeal, Davila petitioned the United States Supreme Court for writ of certiorari, which was denied. *See Davila v. Texas*, — U.S. —, 132 S.Ct. 258, 181 L.Ed.2d 150 (2011). While the appeal was pending, Davila's habeas counsel petitioned the convicting court for a writ of habeas corpus. The convicting court recommended that all claims be denied. Based on the convicting court's findings and conclusions and its own review of the record, the CCA denied relief in 2013. Ex

parte Davila, No. WR–75356–01, 2013 WL 1655549 (Tex.Crim.App. Apr.17, 2013).

The Court appointed federal counsel, and Davila filed a petition for writ of habeas corpus and supporting brief on April 14, 2014 (ECF No. 16), which he amended on May 19, 2014 (ECF No. 17). Respondent filed its answer on September 4, 2014 (ECF No. 29), and Davila filed a reply on October 27, 2014 (ECF No. 33).

On May 19, 2014, Davila filed an Opposed Motion to Stay and Abet the proceedings, seeking to return to state court to exhaust his ineffective assistance of trial and appellate counsel claims. Mot. Stay, ECF No. 18. In its November 10, 2014 Order, this Court denied relief on the basis that Davila failed to establish good cause for his failure to exhaust the claims and because he failed to establish that the "unexhausted" claims were potentially meritorious. Order, Nov. 10, 2014, ECF No. 34. Davila additionally filed an Opposed Motion for Hearing on May 21, 2014, seeking an evidentiary hearing regarding the issue of whether any procedural default could be excused on the grounds of ineffective assistance of counsel rendered either on direct appeal or in state habeas proceedings. Mot. Hr'g, ECF No. 20. On November 10, 2014, this Court denied the motion without prejudice on the basis that Davila failed to identify facts that, if true, would entitle him to relief on his ineffective assistance of appellate counsel claim and on the basis that the Court had yet to address whether the state court adjudication was unreasonable. The habeas petition is now ripe for determination.

II. LEGAL STANDARD

This petition is subject to the AEDPA. *See* 28 U.S.C. § 2254. The Court will address the AEDPA standards of review where applicable to the issues raised. When a federal habeas petitioner challenges a prior state court adjudication on the merits, the AEDPA bars relitigation of the claim in federal court unless it (1) is "contrary to" federal law then clearly established in the holdings of the Supreme Court or "involved an unreasonable application of" such law, or (2) "is based on an unreasonable determination of the facts" in light of the record before the state court. *See* 28 U .S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 785, 178 L.Ed.2d 624 (2011). This determination is limited to the record that was before the state court that adjudicated the claim on the merits. 28 U.S.C. § 2254(d)(2); *Cullen v. Pinholster*, —— U.S. ——, ——, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011). These conditions are meant to be difficult to meet and stop short of imposing a complete bar on the relitigation of claims already rejected in state proceedings. *Richter*, 131 S.Ct. at 786.

***3** A state court's decision is "contrary to" Supreme Court precedent if the state court applies a rule that contradicts governing law or confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at an different result. *Coleman v. Thaler*, 716 F.3d 895, 901 (5th Cir.2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A state court's application of law is "unreasonable"

when the state court identifies the correct governing legal principle but applies it unreasonably to the facts of a particular case. *Id.* at 901–02. The petitioner must show that the state court ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter,* 131 S.Ct. at 786–87; *see also White v. Woodall,* — U.S. ——, ——, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014). Thus, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter,* 131 S.Ct. at 786; *Woodall,* 134. S.Ct. at 1702 (stating a "merely wrong" holding or "clear error" will not suffice).

Factual determinations in a state court's decision are presumed correct, and a petitioner bears the burden of rebutting them by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see Burt v. Titlow,* —U.S. ——, ——, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013). A "decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." 28 U.S.C. § 2254(d)(2); *Miller–El v. Cockrell,* 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). A "state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Titlow,* 134 S.Ct. at 15 (citing *Wood v. Allen,* 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010)). The presumption of correctness attaches to explicit findings of fact as well as "unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Pippin v. Dretke,* 434 F.3d 782, 788 (5th Cir.2005) (quoting *Pondexter v. Dretke,* 346 F.3d 142, 148 (5th Cir.2003)). With this framework in mind, the Court turns to Davila's claims.

III. SUFFICIENCY OF THE EVIDENCE (CLAIM 1)

Davila first asserts that the evidence is legally insufficient to support his conviction for capital murder. Am. Pet. 36–45, ECF No. 17. Specifically, he contends that capital murder in Texas requires the specific intent to kill two people; thus, the evidence adduced at trial showing Davila only intended to shoot one individual is insufficient to support his conviction. *Id.* at 37. In response, Respondent argues that the evidence establishes that Davila intended to kill multiple gang members and the doctrine of transferred intent applies, which established sufficient intent to kill the two victims. Resp. 39, ECF No. 29. This claim was raised and rejected by the CCA on direct appeal.

A. Applicable Law

*4 The standard set forth in *Jackson v. Virginia* applies where an appellant challenges the legal sufficiency of the evidence presented at the trial court supporting his conviction. 443 U.S. 307, 308, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see also Brooks v. State,* 323 S.W.3d 893, 895 (Tex.Crim.App.2010) ("[T]he *Jackson v. Virginia* legal-sufficiency standard is the

only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt."). On federal habeas review, "the limited question before [the federal] court is whether the CCA's decision to reject [the petitioner's] sufficiency of the evidence claim ... was an objectively unreasonable application of the clearly established federal law set out in *Jackson*." *Martinez v. Johnson*, 255 F.3d 229, 244 (5th Cir.2001). The evidence is sufficient to support the jury's verdict if, viewing the evidence in the light most favorable to the verdict, any rational juror could find the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Martinez*, 255 F.3d at 244 n. 21. The *Jackson* standard is used to determine if the amount of evidence satisfies the Due Process Clause, while state law determines the substantive elements that must be proven. *Coleman v. Johnson*, — U.S. ——, ——, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012) (per curiam).

Texas Penal Code Section 19.03(a)(7)(A) provides that "[a] person commits [capital murder] if the person commits murder as defined under Section 19.02(b)(1) and ... the person murders more than one person ... during the same criminal transaction." Tex. Penal Code Ann. § 19.03(a)(7)(A) (West 2013). A person commits murder under Section 19.02(b)(1) where he "intentionally or knowingly causes the death of an individual." *Id.* at § 19.02(b)(1). In addition, under Texas law, the doctrine of transferred intent provides that a person may be held "criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that ... a different person or property was injured, harmed, or otherwise affected." *Id.* at § 6.04.

B. Evidence Presented

The CCA determined that there was "ample evidence in the record to support the jury's verdict that [Davila] intended to cause more than one death in his 'shoot em up' attack." *Davila*, 2011 WL 303265, at *4–5. Specifically, the CCA concluded that the evidence at trial established the following:

> The evidence shows that [Davila] intended to kill possible members of the Crips gang, but he mistakenly killed a grandmother and small child instead. As [Davila] himself explained, he went to "a shoot em up" in which he intended to kill "the fat dude in the middle of the street" and the three "guys on the porch." That is, he intended to shoot four males, not two females. But, under Texas law, the intent to kill four males will transfer to the unintentional killing of two females.
>
> *5 ...
>
> (1) [Davila] gave a written statement explaining that he intended to "get the fat dude" and who he mistakenly thought were three guys on the porch;
>
> (2) Cashmonae testified (as did other witnesses) that [Davila] aimed the "red dot" at "different parts of the house" and at different persons;

(3) [Davila] used a high-powered SKS semi-automatic rifle with an infrared beam to fire between ten to fifteen bullets into the group of women and children on Ms. Stevenson's front porch;

(4) [Davila] fired a burst of bullets from one location across the street, then paused as he ran to the middle of the street and fired a second burst of bullets;

(5) [A witness] said that [Davila] looked "frustrated" after the first burst of fire when [Jerry Stevenson] had escaped into the house, so [Davila] moved and then fired a second burst at the remaining women and children;

(6) [Davila] used a rifle with an infrared scope that would give him greater precision in shooting at what he intended to hit;

(7) His semi-automatic SKS required him to pull the trigger each time he intended to shoot; thus he intended to shoot his targets at least ten to fifteen different times;

(8) Expert testimony that [Davila's] choice of bullets, high-powered hollow-point bullets, was consistent with a shooter who wants to cause maximum damage or death to his intended target.

Id.

C. Analysis

Davila argues that the CCA's factual determinations were unreasonable. Am. Pet. 41, ECF No. 17. Specifically, Davila argues that the determination that "the jury's verdict showed Davila 'intended to cause more than one death in his 'shoot him up' attack' " is incorrect. *Id.* In support, he points to a note the jury sent during their deliberations. *Id.* The note stated: "In a capital murder charge, are you asking us did he intentionally murder the specific victims or are you asking us did he intend to murder a person and in the process took the lives of 2 others." Clerk's R. vol. 44 (Jury Note 2) 1931, ECF No. 10–44. Davila argues that this note "clearly established the jury believed Davila intended to murder 'a person.' " Am. Pet. 41, ECF No. 17. He further argues that the CCA improperly utilized his written statement "explaining that he intended to 'get the fat dude' and who he mistakenly thought were three guys on the porch" to establish that he intended to kill at least two individuals. *Id.* Davila argues that this was erroneous because Jerry Stevenson, whom Davila intended to kill, was the only adult male at the birthday party. *Id.* at 42. Davila further contends that the CCA incorrectly concluded that witness Cashmonae testified that Davila "aimed the 'red dot' at 'different parts of the house' and at different persons." *Id.* Finally, Davila argues that the CCA incorrectly summarized witness Eghosa Ogierumwense's testimony. *Id.* at 43–45. Although the CCA stated that Eghosa "said that [Davila] looked 'frustrated' after the first burst of fire when [Jerry Stevenson] had escaped into the house, so [Davila] moved and then fired a second burst at the remaining women and children," Eghosa actually explained that the beam from Davila's weapon was first pointed on Stevenson and then was pointed on the

windows of the home after Stevenson walked inside the home. *Id.* at 43.

***6** The Court finds support in the record establishing that Davila had the intent to kill multiple individuals. Specifically, Davila's own written statement established that he intended to shoot four members of a rival gang. In addition, the testimony also established that Davila intended, at two separate times, to kill Jerry Stevenson. *See, e.g., Ex Parte Norris,* 390 S.W.3d 338, 341 (Tex.Crim.App.2012) (noting defendant's intent to kill one individual on two separate instances was sufficient to establish capital murder under transferred intent theory). As a result, the CCA's decision to reject Davila's sufficiency of the evidence claim was not an objectively unreasonable application of the clearly established federal law set out in *Jackson. See Jackson,* 443 U.S. at 308. This claim is denied. *See* 28 U.S.C. § 2254(d)(1).

IV. ASSISTANCE OF TRIAL COUNSEL (CLAIMS 2 & 4)

Through state habeas counsel David Richards ("Richards"), Davila presented his ineffective assistance of trial counsel claim against Robert Ford and Joetta Keene ("trial counsel"). The habeas court granted Davila funding for a mitigation specialist, conducted an evidentiary hearing, and issued Findings of Fact and Conclusions of Law, recommending that the claim be denied for a lack of merit. The CCA adopted the findings of fact and conclusions of law. *Ex parte Davila,* 2013 WL 1655549.

Davila now reasserts that his trial counsel rendered ineffective assistance by failing to properly investigate and present the mitigation case. Am. Pet. 46–79, ECF No. 17. Davila further maintains that Richards was ineffective during the state writ proceedings because Richards attempted to "wing it" at the state-writ hearing and inadequately presented the ineffective assistance of trial counsel claim. *Id.* at 91–102. In response, Respondent contends that the CCA reasonably rejected the ineffective assistance of trial counsel claim on the merits, and Davila has failed to meet his burden under § 2254. Resp. 40, ECF No. 29. The Court addresses each issue in turn.

A. Applicable Law

The clearly established federal law governing claims of ineffective assistance of trial counsel is *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Williams v. Taylor,* 529 U.S. 362, 398–99, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under *Strickland,* Davila must first demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland,* 466 U.S. at 688. The objective standard of reasonable representation is defined by prevailing professional norms and is necessarily a general standard. *See Bobby v. Van Hook,* 558 U.S. 4, 7, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009).

Restatements of professional standards, such as the American Bar Association guidelines, are "only guides" to what is reasonable and are properly considered only to the extent they describe the prevailing professional norms and standard practice, and the restatements are not so detailed

that they "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* at 8–9 n. 1. The Constitution imposes "one general requirement: that counsel make objectively reasonable choices." *Id.* at 9. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Pinholster,* 131 S.Ct. at 1403 (quoting *Strickland,* 466 U.S. at 690)). This standard not only gives trial counsel the benefit of the doubt, but affirmatively entertains the range of possible reasons counsel may have had for proceeding as they did. *Id.* at 1407.

*7 Trial counsel's failure to reasonably investigate and present mitigating evidence to a sentencing jury, when such evidence would have been discovered by a reasonably competent defense attorney, amounts to ineffective assistance of counsel. *Wiggins v. Smith,* 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Regarding counsel's duty to investigate, strategic decisions made by counsel following a thorough investigation are "virtually unchallengeable." *Strickland,* 466 U.S. at 690. "[S]trategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 691.

Generally speaking, complaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and allegations of what a witness would have stated are largely speculative. *See Gregory v. Thaler,* 601 F.3d 347, 352 (5th Cir.2010); *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir.1985). To prevail on this type of claim, the petitioner must name the witness, demonstrate that he was available to testify and would have done so, set out the content of the proposed testimony, and show that the testimony would have been favorable to a particular defense. *Id.* This showing is required for claims regarding uncalled lay and expert witnesses alike. *See, e.g., Evans v. Cockrell,* 285 F.3d 370, 377 (5th Cir.2002).

Next, Davila must demonstrate that there is a reasonable probability that prejudice, sufficient to undermine confidence in the trial outcome, resulted from counsel's deficiency. *See Strickland,* 466 U.S. at 694. A "reasonable probability" of prejudice requires a substantial, not just a conceivable, likelihood of a different outcome. *Pinholster,* 131 S.Ct. at 1403. For claims that challenge counsel's sentencing investigation, the reviewing court reconsiders the evidence in aggravation against the totality of available mitigating evidence and determines whether there is a probability, sufficient to undermine confidence in the outcome, that the jury would have assessed a life sentence. *See Wiggins,* 539 U.S. at 534. After reviewing all of the evidence, the court must ultimately "decide whether the additional mitigating evidence was so compelling that there was a reasonable probability that at least one juror could have determined that because of the defendant's reduced moral culpability,

death was not an appropriate sentence." *Id.* (internal quotation marks omitted).

B. Relevant Facts

1. *Trial Counsel's Investigation*

At the state writ hearing, trial counsel Joetta Keene testified that she spent an estimated time of 100 hours and co-counsel Robert Ford spent an estimated time of 80 hours on the mitigation investigation alone.[1] State Habeas Rep. R. (vol.2) 27, 37. Keene testified that she and Ford met with multiple doctors. *Id.* at 37. Keene noted that although she and Ford worked with psychologist Dr. Emily Fallis ("Dr.Fallis") in preparing a PowerPoint presentation for trial, Keene and Ford remained in charge of the mitigation investigation. *Id.* at 27–28, 37. Because Davila had made an attempted escape from jail, Keene stated she felt the mitigation case was the "real issue" for purposes of punishment. She believed the mitigation investigation should not be delegated because she had to build relationships with her witnesses first. *Id.* at 28. So, with the help of their fact investigator, Keene and Ford would find and talk to witnesses. They would then refer certain persons to Dr. Fallis, who would interview them from the psychologist's standpoint. *Id.* Davila was also submitted for a psychological evaluation with Dr. Kelly Goodness and neurological testing with Dr. Dennis Zgaljardic. *Id.* at 8, 30. Keene noted that she and Ford spoke with many of Davila's former teachers, his employer, and many of his family members.[2] *Id.* at 30, 33–34.

2. *Aggravating Evidence*

*8 The State introduced evidence that Davila attempted to escape from jail while awaiting trial, committed an aggravated robbery and an additional murder only two days before this capital offense, and was convicted of burglary of a habitation two years earlier. The State also introduced evidence of a traffic stop where a gun and marijuana were found in Davila's car and testimony about his presence as a security threat in the jail.

The State first called Gabriel Ramos who testified about an incident wherein Davila and two other individuals held Ramos and Ramos's boss at gunpoint while demanding money. Trial Tr. vol. 20 at 65:17–24, ECF No. 11–22. Ramos related that the robbery occurred at 5:00 in the morning on April 4, 2008. *Id.* at 104:7–19. He noted that Davila held a gun to Ramos's boss's head while demanding that he give Davila all of his money. *Id.* at 89:1–5. At one point, one of Davila's cohorts feared that the cops were near and advised that they should leave. *Id.* at 91:5–25. Davila then released Ramos's boss and started to retreat to his vehicle. *Id.* However, as he was doing so, he stopped and returned to Ramos's boss and again placed his gun on his head. *Id.* It was only at Davila's cohorts' insistence that Davila returned to his own vehicle and left the scene. *Id.* at 91:19–25, 92:1–2. Ramos noted that it appeared that Davila was in charge of the robbery. *Id.* at 106:17–20.

The jury next heard from Detective Thomas Wayne Boetcher. Detective Boetcher took

Davila's written confession regarding the extraneous murder of Darrell Ford and read the written confession to the jury:

> On the first part of the month, it was 4 Trey Day, April the 3rd. That's how I remember the day. I went to the convenience store on East Lancaster by the French Quarters. A friend of mine named Taylor *[sic]* was with me. We call him T. He hangs around East Lancaster. He wears red. He is not put down with any particular set.
>
> I was driving Nichcole's car, and Taylor was with me on the passenger side. We both went into the store, and when I came out and started up the car, I let my window down on the driver's side, and then this old school man walked up to me. He was a black male about 37 years old. He walked up to me on the driver's side of the car while I was sitting in it. He didn't say nothing to me, he just pulled a pistol out on me and pointed it to my head.
>
> I thought I was going to die in the car. I wait-I waited for Taylor, and he didn't come out. I–I told-I told him what happened, and he was surprised. We hung around the back of the apartments and smoking. We stayed out there all day, and finally went to leave around 4:00 a.m.
>
> ...
>
> When we went to leave, we seen the dude talking to the lady and another dude. We were in the front of the store. The store was closed, and I got the strap from the back of the apartments earlier to get him. I told Tyler to let me off on East Lancaster, and I was going to walk up there.
>
> *9 I went up to the store, and I was walking-as I was walking to him, the guy said to me, what's up? And then he said, What's up G Money? I said, What, and I let him have it. I shot him as he walked towards me, and then I went and got back in the car with Tyler and went home. I shot him because he had drawn down on me earlier in the day and pointed a gun at my head.

Trial Tr. vol. 21 at 21:8–25, 22:1–5, 23:3–16, ECF No. 11–23.

Tanna Martinez, who was with Darrell Ford when he was shot, next testified. Martinez noted that she was a prostitute and Ford dealt illegal drugs and "watched out" for Martinez while she "was jumping in and out of cars, making sure nothing happened to [her]." *Id.* at 72:3–12, 73:18–25. She testified that on the evening of April 3, 2008, she and Ford were standing on the corner after just having smoked crack, when a black vehicle drove past them. *Id.* at 76:1–6. Martinez noted that the she and Ford noticed the vehicle because they thought the driver was looking to pick up a prostitute. *Id.* at 77:16–25, 78:1–2. They noticed that when the vehicle first drove past them, it had two occupants, but when it drove past them again, it only had one. *Id.* She then related that she then saw a man, who she later identified as Davila, walking towards her and Ford. *Id.* at 78:20–24. Davila held his head down and did not say anything to them. *Id.* Ford then asked Davila, "What's up," and Davila did not respond. *Id.* Davila then

pulled out a gun and Ford told Martinez to turn and run. *Id.* at 79:3–9. Martinez turned to run, but then fell. *Id.* She then heard "pow, pow" and turned back around and saw that Ford had begun to run, but then hit the ground. *Id.* She noted that Davila then walked over to Ford and shot him four more times in the back. *Id.* at 79:11–12.

The jury later heard that Davila had previously been convicted and sentenced to prison on May 11, 2006, for the offense of burglary of a habitation. Trial Tr. vol. 22 at 30:1–5, ECF No. 11–24. Davila was sentenced to three years confinement. *Id.*

The jury also heard from Arlington Police Officer Michael Moses. Officer Moses testified that he conducted a traffic stop on February 12, 2006, involving Davila. *Id.* at 32:13–15. During the stop, the officer found a small amount of marijuana on Davila's person, a loaded 9–millimeter pistol under the front seat of Davila's vehicle, and a brick of marijuana in the back seat of the vehicle. *Id.* at 44:5–6, 44:16–24, 46:1–2. Officer Moses noted that while Davila was cooperative at the beginning of the traffic stop, his demeanor changed when he was placed in the back of the officer's car. *Id.* at 47:1–15. Davila became verbally abusive with the officers. *Id.* During the course of Davila's transportation to the jail, he was able to maneuver his handcuffs from behind his back to the front of his body, which posed a security threat. *Id.* at 57:6–15. The officer finally testified that although he would normally escort a detainee alone into the prison, the officer felt that Davila was a significant security risk, and the officer required four or five jailers to assist him in extracting Davila from the cop car and escorting Davila to the jail. *Id.* at 58:4–6.

***10** Charles Norton, a detention officer at the Tarrant County Sheriff's Department, additionally testified. He discussed one incident wherein he told Davila, who was using the payphone, to hang up the call and return to his cell so that the inmates could be administered their meals. *Id.* at 105:19–24. In response, Davila became argumentative with the officer and refused to end the phone call. *Id.* at 105:23–25. Davila then began "cussing out" the officer and eventually hung up the phone. *Id.* at 106:1417. He then stated, "You don't know who you're messing with, you need to check my resume." *Id.* at 106:20–24. Ultimately, Davila complied with the officer's commands. *Id.* at 108:1–14.

Several other officers testified regarding the security threat that Davila posed while he was incarcerated and awaiting trial. One officer testified that he noticed Davila's nails were long and filed to a point. *Id.* at 126:14–16. This posed a potential safety issue for the jail staff members because officers had been scratched by inmates in the past. *Id.* at 126:18–20. Another officer testified that during a routine inspection of Davila's cell, the officer found contraband in Davila's cell. *Id.* at 135:6–8. When the inspection ended, Davila was instructed to come to the door so that the officers could remove his handcuffs. *Id.* at 134:1–3. Davila moved the handcuffs from behind his back to his front, refused to allow the officers to remove the handcuffs, and became argumentative. *Id.* at 135:1–5. The officer eventually had

to spray Davila with "OC Spray"[3] to get him to comply with his orders. *Id.* at 135:9–10. The officer noted that Davila's behavior after he was sprayed was unusual because while most inmates become "more humble and ... embarrassed," Davila "was singing, making jokes and taunting other inmates still in their cell and other officers." *Id.* at 136:5–8. Another officer testified that when Davila was being transferred for a trial court proceeding, a hairpin was found in Davila's breast pocket of his jumpsuit. *Id.* at 182:21–24, 186:2–3. The officer noted that the hairpin was considered contraband because there was a "[p]ossibility that the hairpin could be used in a set of handcuffs, to get out of locking devices." *Id.* at 183:23–25.

Finally, detention officers testified about Davila's attempted escape from the jail where he was held prior to trial. The first officer to testify, Michael Thompson, noted that he was in charge of escorting Davila and four other inmates to the gym for their state-mandated recreation period. *Id.* at 160:12–13. Once the inmates were secured within the west gym, the officer went to complete paperwork. *Id.* at 161:15–19. However, as he was completing the paperwork, the inmates got the officer's attention and asked to move to the east gym because the floor of the west gym was damp. *Id.* at 162:14–20. As the officer moved the inmates to the east gym, three of them (including Davila) attacked the officer by punching and kicking him multiple times. *Id.* at 164:23–25, 165:1–4. The inmates took the officer's wallet and removed his keys from his holster. *Id.* at 166:9–14. The inmates then demanded an escape route. *Id.* at 166:17–24. The officer sent the inmates down the fire escape, knowing that it would lead them to a dead end. *Id.* Once the inmates left, the officer attempted to summon help. *Id.* at 168:1–12. He additionally noticed that his partner, Teresa Otterson, was also laying face down in the hallway in a pool of her own blood. *Id.* at 169:12–15. A fellow inmate who witnessed the attack noted that the inmates were hitting, kicking, and stabbing Officer Thompson. *Id.* at 115:1–3. He noted that as they were attacking the officer, they were saying, "I'll kill you, and you know, you don't know me, you don't know what I'm in here for. I have nothing to lose. How do you get out of this building?" *Id.* at 116:24–25, 117:1–2.

*11 A nurse who responded to the scene first found Officer Otterson. The nurse noted that Officer Otterson was lying face down with her arms stretched in front of her in a large pool of blood. *Id.* at 230:9–14. Although the nurse attempted to call her name, she did not respond. *Id.* At this point, the nurse feared that she was dead. *Id.* at 230:22–24. Once Officer Otterson regained consciousness, she was very disoriented and "had no idea that she really was even hurt." *Id.* at 231:10–14. Although she "kept rubbing at her hand and saying ... what is this, I'm just a mess, I've just got stuff all over me," she did not realize it was her own blood. *Id.* In addition, a maintenance worker employed through Tarrant County Facilities testified. He testified that he was working to replace some light bulbs within the jail facility and was riding on an elevator with Officer Otterson to retrieve the light bulbs. *Id.* at 243:2–4. As the elevator door opened, the maintenance worker noted that Officer

Otterson first walked out and was struck by an inmate wearing a cast. *Id.* at 243:15–19. The maintenance worker attempted to help Otterson. *Id.* As he was attempting to help her, he noticed that several inmates in various stages of undress and partially covered in blood spatter were approaching him. *Id.* at 245:123. He then turned and ran back onto the elevator. *Id.* at 247:1–8. An inmate then struck him in the face and broke his nose. *Id.* at 247:22–24. A crime scene investigator dispatched to the scene later found a shank[4] inside the gym. Trial Tr. vol. 23 at 70:13–6, ECF No. 11–25.

3. *Mitigating Evidence at Trial*

Trial counsel first presented Allen Dennis, the chief deputy over housing for the Tarrant County Corrections center. Dennis noted that he reviewed the reports authored by several officers regarding Davila's attempted escape and assault of corrections officers. *Id* . at 199:2–6. Based on his review, he determined that the pat down search of the inmates was inadequate, that Officer Thompson's radio had not been properly checked out, and that the east and west gyms had not been properly inspected. *Id.* at 200:5–24, 202:6–14. Dennis additionally noted that the job assignment process for detention officers changed after the incident such that officers were required to rotate their assignments on a regular basis. *Id.* at 203:11–19. Ultimately, Dennis determined that the incident occurred, at least in part, as a result of "complacent lack of safety practices by both the officers involved." *Id.* at 209:2–7. Notably, however, Dennis attributed the biggest factor driving the assault to the "fact that you had three very aggressive individuals that wanted to get out of jail, and they were willing to do just about anything to do that." *Id.* at 210:25, 211:1–3.

The jury next heard from Mario Davila, Davila's father ("Mario"). Mario noted that he was currently incarcerated and serving a 20–year sentence for murder. *Id.* at 220:10–17. Mario fathered five children, three of whom also spent time in prison. *Id.* at 223–24. He testified that he met Davila's mother when he was working in her father's mechanics garage. *Id.* at 225:11–13. At that time, he was around the age of twenty-four and she was thirteen. *Id.* at 242:1–5, 230:12–14. Mario testified that he had a somewhat tumultuous relationship with Davila's mother, Sheila Olivas, which was caused by Mario's drinking problem. *Id.* at 242:12–23. Mario was sentenced to prison when Davila was very young, and as a result, the burden to raise and care for Davila was largely placed on his mother. *Id.*

***12** Next, Emily Davila ("Emily"), Davila's sister testified. She noted that she and Davila were fathered by Mario Davila. Trial Tr. vol. 24 at 13:20–25, ECF No. 11–26. Although she had written to her father, she had never met him. *Id.* She further testified about her and Davila's poor relationship with their mother, Sheila Olivas. When Emily was thirteen, her mother advised her and Davila that they were the product of a rape. *Id.* at 23:18–20. When she was sixteen, Emily stated that her mother kicked her out of her home, forcing Emily to move in with her boyfriend and his family. *Id.* at 17:16–23. Davila was kicked out of the home when he

was fifteen; he moved in with a girlfriend and her family. *Id.* at 25:7–10. Before they left the home, Emily and Davila worked at a grocery store to help their mother pay the household bills. *Id.* at 27:1–2. Emily further related that she and her mother had previously been in physical fights requiring police intervention and resulting in Emily being put in jail. *Id.* at 30:17–25. In describing the environment in which she and Davila grew up, Emily testified that she would frequently hear gunshots and "would see all kinds of stuff on the ground. Condom wrappers here and there, needles here and there." *Id.* at 38:14–16.

The jury next heard from Sheila Olivas ("Olivas"), Davila's mother. She testified that she was taken out of school when she was ten-years-old. *Id.* at 51:23–25. She explained that, when she was thirteen, her father "placed" her with Mario Davila in exchange for Mario giving Olivas's father money. *Id.* at 53:16–23. She later conceived both Davila and Emily as a result of Mario sexually assaulting her. *Id.* at 54:11–15. Olivas received no prenatal care during her pregnancy with Davila. *Id.* at 57:2–6. Although she would often attempt to leave Mario as a result of his violent, alcoholic tendencies, Olivas's family would always "push" her back with him. *Id.* at 54:24–25, 55:1–8. Olivas additionally testified that as they were growing up, her children often witnessed bouts of domestic violence between Olivas and her romantic partners, some of which required police intervention. *Id.* at 66:16–18. Regarding Davila, Olivas testified that he was diagnosed with ADHD[5] when he was a child and had very poor vision. *Id.* at 69:22–24. He additionally had a difficult time controlling his temper. *Id.* at 99:22–25. Although he was prescribed Ritalin for his ADHD, Olivas quit administering the medication to him because "[w]hen he took it, ... he was like a zombie." *Id.* at 70:12–17. As a student, Davila "had good grades until high school." *Id.* at 71:1–2. When he was twelve or thirteen, Davila began wearing colored clothing suggesting that he was involved in gang activity. *Id.* at 71:14–25. Olivas often picked Davila up from school and he was "beat up." *Id.* at 82:14–15. His teachers additionally reported that Davila "was exhibiting behaviors that are unacceptable in the classroom, and at times [was] endangering the lives of other students in [the] classroom." *Id.* at 100:4–8.

*13 Davila's aunt, Debra Jones, also testified. Jones stated that she was Olivas's younger sister. *Id.* at 113:12. Jones and her two other sisters assisted Olivas in raising and caring for Davila and Emily. *Id.* at 120:17–19. At the age of fourteen, Davila moved in with Jones. *Id.* at 122:9–10. Jones noted that there were "issues" because Davila was "wearing red."[6] *Id.* at 122:17–22. Olivas sent him to live with Jones because she thought that Jones would be able to help Davila. *Id.* Jones noted that she attempted to help Davila by requiring him to attend church every week, having him go the Boys & Girls Club, and discussing gang-related issues with him. *Id.* at 123:7–14. Angela Jones, another of Davila's aunts, further testified that one of her six children (Davila's cousin) also was a gang member-

only he was a member of the Crip gang. *Id.* at 142:6–9.

Dr. Fallis, the psychologist who was hired by defense counsel to prepare a social history on Davila, also testified. In conducting her investigation, Dr. Fallis spoke with Davila, Olivas, Mario, Emily, and his aunt, Debra Jones. *Id.* at 184:17–25, 185:1–5. She also spoke with "a former teacher who remembered him from middle school, Lisa Walker [and] ... someone who runs ... a program through the Boys and Girls Club of Fort Worth and some program to keep kids outs of gangs. His name is Melvin Carter. And two of his associates." *Id.* She additionally reviewed Davila's school, medical, and penitentiary records. *Id.* at 184:5–10, 186:8–12. Dr. Fallis first noted that although Olivas received no prenatal care, Davila's birth was "normal." *Id.* at 190:7–10. Developmentally, Davila reached the early milestones, such as potty training, walking, and talking, at normal points in time. *Id.* at 191:11–20. When Davila first began his schooling, however, he began exhibiting behavioral problems, which included "[h]itting other kids, hitting his teacher, throwing furniture, running away from the teacher, interrupting the teacher, being very fidgety, just could not sit still. Being silly in the classroom. Having difficulty following directions." *Id.* at 192:7–11. His behavior issues were so significant that the school threatened to expel him from the first grade. *Id.* at 192:12–13. Davila was later diagnosed with ADHD and was prescribed Ritalin. *Id.* at 193:20–24. Although Davila's teachers reported that there was a "significant improvement in terms of not just his behavior, but also his academic performance" as a result of the Ritalin, Olivas decided to discontinue the treatment. *Id.* at 194:1–3, 213:9–12. Davila's records indicated that he had other behavioral issues in the fifth grade and was sent to an alternative school in the tenth grade. *Id.* at 195:1–5.

Davila was relatively uninvolved in any type of extracurricular activities-"no sports, no clubs, or other groups, apart from one brief period of playing soccer"-during his younger years. *Id.* at 195:1519. Because he was not involved in pro-social activities, Dr. Fallis noted that Davila was more vulnerable to developing problems later on in his life. *Id.* at 195:20–23.

***14** At the age of seven, Davila was administered an IQ test in which he performed significantly below average. *Id.* at 198:24. He also had very poor vision and was not encouraged or made to wear his glasses, which impaired his schooling. *Id.* at 200:4–8. Despite the fact that Olivas reported that he made excellent grades through elementary, middle, and high school, Dr. Fallis noted that Davila's records proved otherwise. *Id.* at 199:10–13. Instead, Davila's school records from fifth grade and on established that he received low grades, and sometimes failed his core classes. *Id.* at 201–03. Additionally, he received several failing grades on his state-mandated tests. *Id.* at 204:18–22. Dr. Fallis found that Olivas, who had only received a third-grade education, did not place an emphasis on education in Davila's life. *Id.* at 197:5–8. In support, she noted that Davila

was frequently absent from school.[7] *Id.* at 201:15–16, 205:16–21.

With respect to the quality of his relationships, Dr. Fallis noted that she could not find information suggesting that Davila had many friendships. *Id.* at 218:1–3. As a teenager, Davila dated and lived with much older women. *Id.* at 217:19–25 (noting that at age 15, Davila dated a 28–year–old woman and a 32–year–old woman). He also joined the Blood gang as a young teenager. *Id.* at 218:1114. Davila had very limited contact with his father as a child, and had no physical contact with his father after the age of two, when his father went to prison. *Id.* at 223:13–18. Dr. Fallis further detailed the pattern of crime within Davila's family: "Mario has brothers, these would be [Davila's] uncles, who are also incarcerated. Mario has fathered other children. These would be [Davila's] half brothers. They are also incarcerated. There's a lot of conflict amongst the family members who are not incarcerated. A lot of arguing and fighting. And there's also a significant history of substance abuse amongst the paternal relatives." *Id.* 225:23–25, 226:1–5. Davila further has a history of "mental health problems, substance abuse problems and learning problems." *Id.* at 252:13–25.

Ultimately, Dr. Fallis stated that Davila was vulnerable to several risk factors he experienced during his development:

> I believe that the risk factors that are pertinent in-in his case are the-the genetic factors that have to do with developing ADHD, the limited intellectual abilities. Being raised by a teenage mother. Having a limited attachment to her because he was the product of a rape. Having been exposed to neglect from his mother. Exposed to domestic violence in the home. Not having a father in the home. Finding out that the father he identified as his-as his dad was actually not his father. Finding out that his biological father was someone who is in prison for a violent crime.
>
> Not having the medication that assisted him in his schoolwork and his behavioral problems, the Ritalin continued. Not having a parent or a caretaker that pursued the academic assistance that he needed through school.
>
> ***15** Another risk factor would be not involving him in prosocial activities in his early childhood, his later childhood, his adolescence. Getting exposed to gangs in the school system and the neighborhood. And when the-the red flags arose that suggested he was getting gang-interested in gangs that there was not some intervention then.
>
> I think the-the generational problems, the ways that his own mother was treated and then how that affected her parenting of him was a risk factor. The growing up in a family that was in the lower socioeconomic strata was a risk factor. Being in a neighborhood that tends to be a high crime area was a risk factor. And being involved in a gang was a risk factor.

Trial Tr. vol. 25 at 20:10–25, 30:1–15, ECF No. 11–27.

During closing arguments, the State argued that Davila's violent history-including the armed robbery, murder, and capital murder all committed within one week and his later attempted escape from jail-supported a finding that he would be a future danger to society. *Id.* at 54:9–23. In response, defense counsel argued to the jury that their focus should be not on what Davila had done in the past, but instead on his capacity to change in the future. *Id.* at 58:22–25, 59:1–18. Trial counsel drew on testimony elicited during cross-examination of the State's gang expert that many experiences Davila had in his life such as ADHD, his poor family structure, his relationship with his mother, and socioeconomic status were risk factors for gang activity. *Id.* at 63:19–25. In addition, trial counsel referenced the State's expert's testimony that most gang members change and "mature" out of their behavior. *Id.* at 64:12–17.

With respect to the mitigation issue, trial counsel, although admitting that Davila made horrible choices in committing the crimes, focused on the choices Davila did not make: his teenage mother, his conception as a result of sexual assault, having a father who spent the majority of his life in prison, having no familial support from his grandparents, being raised in an environment that did not value education, growing up poor, and his lack of involvement in extracurricular activities. *Id.* at 67–70. Ultimately, trial counsel argued that Davila was "worth life" and deserved the opportunity to have time to change while in prison. *Id.* at 72–73.

4. *Mitigating Evidence Presented to State Habeas Court*

During the state writ proceedings, Davila hired mitigation expert Toni Knox to conduct a mitigation investigation to determine whether trial counsel found and presented adequate mitigation evidence through trial counsel's investigation. Am. Pet. 46, ECF No. 17. Knox testified about her findings at the state writ hearing and provided an affidavit. *Id.* at 47.

Knox noted that trial counsel failed to attempt to contact Davila's maternal step-grandmother, Rosa Jones Nash and Davila's aunt, Sandra Kay Vargas. State Habeas Clerk's R. (vol.1) 35, 38. Each of these individuals, however, refused to sign an affidavit. *Id.* at 146. In fact, when one of Knox's associates, James Hughes, went to meet with Nash and Vargas, he was met by males who "informed [him], in what [he] perceived to be a threatening way, that [he] needed to leave as the family did not want to get involved in [Davila's] case as they were fearful of some type of gang retaliation and just did not want to be involved." *Id.*

***16** Ethel Fay Jones–Silverio, Davila's aunt, provided an affidavit. *Id.* at 155. She noted that Mario Davila was a "gangbanger" who would steal from his family and did illicit drugs. *Id.* Olivas met Mario when he worked in her father's garage and pursued him. *Id.* Olivas would often sneak out of her home to meet Mario and stay with him overnight. *Id.* at 156. Prior to her relationship with Mario, and at the age of twelve, Olivas had been sexually active with a man who was thirty-years-

old. *Id.* According to Jones–Silverio, Olivas's testimony that she was "sold" by her father to Mario Davila was untrue. *Id.* Olivas did not treat Davila and his sister Emily in the same manner in which she treated her other children-she treated them like "outcasts." *Id.* As punishment, Olivas would often make Davila and his sister Emily stand in a corner for hours at a time. *Id.* at 157. Jones–Silverio saw permanent stains on the walls where Davila had cried on the wall and marks where his forehead had been pressed against the wall. *Id.* Olivas would also force Davila and Emily to work in the home and care for their younger siblings, and she would also force them to work outside the home so that she could take their paychecks. *Id.* at 158–59. These same facts were further established in an affidavit obtained from Lynda Jones Mireles, Davila's cousin. *Id.* at 163 (noting she saw tear streaks on the wall where Davila and Emily were forced to stand as punishment for not cleaning the home).

Olivas's sister-in-law, Elizabeth Olivas, also provided an affidavit. She reiterated that Olivas treated Davila poorly and would often hit him as punishment. *Id.* at 168. She noted that she was "sorry that [she] was unable to speak with [Davila's] defense attorneys at the time of his trial because [she] would have explained the effects that [Olivas] had on him growing up." *Id.* at 169. Additionally, she stated that she blamed Olivas for what happened to Davila. *Id.*

Finally, Emily Davila's boyfriend's mother, Lisa G. Wallace provided an affidavit. She noted that Olivas was very manipulative and would force Emily and Davila to give her their paychecks. *Id.* at 173. Davila lived in Wallace's home for a very short period of time after he got out of prison. *Id.* She noted that when Davila lived with her, he "abided by [her] rules and seemed to be doing well." *Id.*

C. Analysis (Claim 2)

The state trial court entered findings of fact and conclusions of law, which were adopted, in whole, by the CCA. *See* State Habeas Clerk's R. (vol.2) 331–345; *Ex Parte Davila*, 2013 WL 1655549, at *1. The Court reviews the findings of fact and conclusions of law under the standards set forth in 28 U.S.C. § 2254(d).

1. *Strickland Analysis–Prong 1*

Davila fails to establish his claim under the first *Strickland* prong. There are countless ways in which to effectively represent a capital defendant. *See Pinholster*, 131 S.Ct. at 1403 (quoting *Strickland*, 466 U.S. at 689). Here, the mitigation team consisted of two seasoned defense attorneys, an investigator, and a psychologist. Trial counsel also consulted with multiple doctors who advised them about gang membership and gang activity. State Habeas Rep. R. (vol.2) 37. Trial counsel made the decision to utilize Dr. Fallis as the mitigation specialist before the jury. The ABA Guidelines-which are not binding upon this Court-allow for the use of psychologists as mitigation specialists. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.4, cmt. 1003 (2003) (noting that counsel is free to allocate duties imposed by the guidelines to appropriate

members of the defense team, with two exceptions inapplicable in the instant case). Trial counsel was also able to use the State's expert, Dr. Sabir, to elicit helpful information to explain Davila's risks for gang involvement. Additionally, although Davila's Aunt Ethel Jones did provide an affidavit, she refused cooperate with trial counsel and did not want to testify at the time of trial. State Habeas Rep. R. (vol.2) 113–114. Keene also noted that both she and Ford talked with Lisa Wallace and sought her trial testimony, however, Wallace did not want to participate in the trial. *Id.* at 115. The Court finds that trial counsel's performance did not fall below a constitutionally acceptable level; thus, Davila's claim fails. *See Strickland*, 466 U.S. at 716. However, even if trial counsel's performance were deficient, Davila still cannot establish prejudice under prong two.

2. *Strickland Analysis–Prong 2*

*17 Here, as the trial court appropriately found, most of the evidence set forth in Davila's habeas petition was cumulative of the evidence presented at trial. During the sentencing phase, the jury heard that Davila did not form a normal bond with Olivas, and that Olivas treated Davila and his sister Emily in a neglectful and abusive manner. This was established through testimony regarding (1) Olivas being "sold" to Davila's father when she was thirteen and raising Davila and Emily without their father; (2) the role Davila and Emily had to pay in helping to financially support the family; (3) the bouts of physical violence between Emily and Olivas; (4) the fact that Olivas advised Davila and Emily at an early age that they were conceived through sexual assault; (5) the alcohol abuse and incarceration of Davila's father early in Davila's life; (6) Olivas kicking Emily and Davila out of the home when they were young teenagers; (7) Olivas failing to keep Davila properly medicated and not requiring him to wear his eyeglasses despite his poor vision; and (8) an extended family culture of crime and incarceration. To the extent new evidence from Olivas's relatives suggests that Olivas minimized her wrongdoing before the jury, the jury heard Dr. Fallis's testimony, which had the same effect. The jury was adequately informed of the abusive, neglectful, and manipulative environment in which Davila lived as a child. As a result, Davila failed to make the requisite showing that the additional mitigation evidence undermines confidence in the verdict. Courts must be "particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Skinner v. Quarterman*, 576 F.3d 214, 220 (5th Cir.2009).

Further, not all of the witnesses discovered through the state habeas investigation would have provided helpful testimony at trial. Two of the individuals whom Knox identified-Rosa Nash Jones and Sandra Kay Vargas-refused to provide an affidavit to Knox. In fact, when Knox's associate attempted to meet with Jones and Vargas to secure their affidavits, he was threatened by their male family members and told that Jones and Vargas would

not provide an affidavit for fear of gang retaliation. Furthermore, Ethel Fay Jones–Silvero described Davila's gang activity when he lived in her home. She stated she came home to find red scarves hanging all over her apartment. She confronted Davila and his then live-in stripper girlfriend, stating that they could no longer stay with her because she feared retaliation from a rival gang.

In addition, whatever mitigating impact the additional information may have had on the jury would have been overwhelmed by the State's aggravating evidence. The jury learned that Davila posed a security threat to detention officers on several occasions when he was incarcerated. In fact, while he was incarcerated in the time leading up to trial, he and three other inmates attempted to escape from jail by brutally beating two guards and a maintenance worker. Each of the guards spent a considerable amount of time off of work as a result of the injuries they sustained in the attack. Additionally, the jury learned of Davila's violent criminal history including an instance where he and two of his cohorts robbed two individuals at gun point in the week prior to the capital murder. Other witnesses also testified about the cold-blooded murder of Darrell Ford committed only days prior to the instant capital murder. One witness noted the dead look in Davila's eyes after he shot and killed Ford.

***18** The minimal impact the additional mitigating evidence may have had on the jury would have also been overshadowed by the brutal facts of the murder. *See Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir.1999). Brandishing a high-powered SKS semiautomatic weapon, Davila opened fire into a group of several women and fifteen children who were celebrating a child's birthday party. Davila shot and killed a grandmother and a five-year-old girl. He injured three other children and an adult, who, through no act of Davila's, managed to survive. Comparing the mitigating and aggravating evidence, the Court finds that there is no "reasonable probability that, absent the error, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Sonnier v. Quarterman*, 476 F.3d 349, 356–57 (5th Cir.2007) (citing *Strickland*, 466 U.S. at 695).

Defense counsel's closing argument to the jury revolved around Davila's capacity to change for the better. However, further evidence of how bad Davila's childhood was may have only cemented in the jury's mind his inability to change and would have run counter to the chosen defense theory. *See Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir.2012), *cert. denied*, —— U.S. ——, 133 S.Ct. 1244, 185 L.Ed.2d 190 (2013) (concluding counsel's decision not to offer evidence of a defendant's troubled, impoverished, and disadvantaged background was reasonable because the evidence could suggest he was a product of his environment and therefore likely to be dangerous in the future). Further, the facts that Emily was raised under the same circumstances as Davila and yet managed to live her life differently, would dilute the mitigating impact of any additional

"difficult-childhood" evidence. *Guevara v. Stephens,* No. 13–7003, 2014 WL 3894303, at *5 (5th Cir.2014) (holding that any information about Guevara's difficult life in El Salvador would have been undermined by, among other things, his brother's clean record despite their shared childhood).

In sum, considering all of this evidence in its totality, the Court's confidence in the verdict is not undermined. *Cf. Wiggins,* 539 U.S. at 535 (reciting "powerful" overlooked mitigation evidence of severe privation and abuse while in care of an alcoholic, absentee mother; physical torment, sexual molestation, and repeated rape while in foster care; periods of homelessness; and diminished mental capacities); *Escamilla v. Stephens,* No. 12–70029, 2015 WL 680405, at *5 (5th Cir.2015) (affirming denial of ineffective assistance of counsel claim after finding no prejudice in case where no mitigation investigator was hired). The Court finds that the CCA's determination did not result in a decision that was contrary to, or involved an unreasonable application of clearly established federal law; nor did it result in a decision based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1)-(2). Claim Three is denied. *See id.*

D. State Habeas Counsel's Performance (Claim 4)

*19 In Claim Four, Davila argues that state habeas counsel was ineffective during the state habeas proceedings by failing to properly litigate the ineffective assistance of trial counsel claim. Am. Pet. 91–102, ECF No. 17. Specifically, he states that counsel was "ineffective for failing to subpoena any of the witnesses (other than Toni Knox) to testify at the state writ hearing," and was "further ineffective for failing to gain anything more than a passing familiarity with the facts, hoping instead to 'wing it' by parroting Ms. Knox's report." *Id.* at 91–92. He appears to assert that, under *Martinez v. Ryan,* state habeas counsel's ineffectiveness precludes AEDPA deference and, perhaps, allows this Court to consider new evidence not presented in state court.[8] *See Martinez v. Ryan,* — U.S. —, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012); *Trevino v. Thaler,* — U.S. —, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013).

The ineffective assistance of trial counsel claim was previously adjudicated on the merits in state court. The "new" evidence presented to this Court in the form of an additional affidavit from Toni Knox does not render the claim unexhausted. *Ward v. Stephens,* 777 F.3d 250, 258 (5th Cir.2015). Because the claim is exhausted, there is no procedural bar asserted, and *Martinez* does not apply. *Brown,* 684 F.3d at 489 & n. 4. Moreover, the Court's review of the state court decision must be based only on the evidence that was before the state court. *Pinholster,* 131 S.Ct. at 1398. For the reasons previously discussed, the Court finds that the state court's rejection of the ineffective assistance of trial counsel claim was not unreasonable. *See supra* Part IV.C. The Court denies Claim Four.

V. ASSISTANCE OF APPELLATE COUNSEL (CLAIMS 3 & 4)

Through appellate counsel Mary Thornton ("Thornton"), Davila filed a direct appeal with the CCA. In the appeal, Davila raised fourteen points of error. After reviewing the merits of Davila's claims, the CCA affirmed Davila's conviction and sentence in an unpublished, unanimous opinion. *Davila v. State*, No. AP–76,105, 2011 WL 303265 (Tex.Crim.App. Oct.3, 2011).

In Claim Three, Davila now contends that Thornton failed to recognize and raise the claim that Davila was convicted through the use of an improper jury instruction. Am. Pet. 81–90, ECF No. 17. Respondent argues that the claim against Thornton is unexhausted, procedurally defaulted, and meritless because the jury instruction was proper. Davila asserts that any default may be excused because appellate counsel and state habeas counsel were both ineffective. *Id.* at 89–92, 97.

A. Procedural Bar

Generally, a federal court will not review the merits of a claim that a state court declined to hear as a result of the petitioner's failure to abide by state procedural rules. *Martinez*, 132 S.Ct. at 1316. This general rule is "designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Id.* An exception exists to the general rule, however, if the petitioner can establish a showing of cause and prejudice. *Id.*

***20** Here, Davila claims that the exception set forth in *Trevino*, ——U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044, excuses his procedural default of the ineffective assistance claim against Thornton. *See* Am. Pet. 89–92, ECF No. 17. The Court previously determined that Davila's third claim appeared to be unexhausted and procedurally barred under *Coleman v. Thompson* because Texas's subsequent writ bar would prevent him from presenting the claim now in state court. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Mem. Op. & Order, Nov. 10, 2014, ECF No. 35. The Court also rejected his assertion that *Trevino* has been extended to excuse the default of claims against appellate counsel. *See Reed v. Stephens*, 739 F.3d 753, 778 n. 16 (5th Cir.2014). Finally, the Court held that ineffective assistance of appellate counsel cannot excuse the procedural default of a claim against said appellate counsel for the simple reason that such claims do not exist to be raised on appeal. They are logically raised, as Davila asserts, in state habeas proceedings.

Thus, the ineffective assistance claim against Thornton is barred, and *Trevino* does not provide an avenue for excusing the procedural default. Assuming, however, that Davila can avoid procedural default, the claim against Thornton is denied on the merits for the reasons discussed below. *See* 28 U.S.C. § 2254(b) (2) (stating that habeas relief may be denied on the merits, notwithstanding petitioner's failure to exhaust).

B. Appellate Counsel's Representation

Davila argues that Thornton was ineffective because she failed to challenge an improper statement of law given in response to the jury's question about transferred intent.

1. *The Instructions*

At trial, the jury was given the following instructions regarding capital murder:

> A person commits an offense of "capital murder" if he commits murder and murders more than one person during the same criminal transaction. A person commits an offense of "murder" if he intentionally or knowingly causes the death of an individual.
>
> ...
>
> A person acts "intentionally," or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.
>
> A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> ...
>
> Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm; and both murders were committed during the same criminal transaction, then you'll find the Defendant guilty of the offense of capital murder.

*21 Trial Tr. vol. 20 (Court's Charge) at 5–8, ECF No. 11–22. During their deliberations, the jury sent a note to the trial court and asked the following:

> We need a clarification of the capital murder charge. In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others.

Clerk's R. vol. 9 (Jury Note 2) 1931, ECF No. 10–44. The trial court responded first with the following supplemental instructions:

> MEMBERS OF THE JURY:
>
> With regard to the charge of capital murder, the definitions of "intentionally" and "knowingly" on page 1 define the mental states referred to in the application paragraph on the top of page 2. These portions are repeated below:
>
> A person acts "intentionally," or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

> A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.
>
> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of capital murder as charged in the indictment and next consider the lesser included offenses of murder.

Clerk's R. vol. 9 (Resp. Note 2) 1932, ECF No. 10–44. The trial court also sent a second supplemental response to the jury (of which Davila now complains). It read:

The Court gives the additional charge on the law as follows:

> "A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, harmed, or otherwise affected."

Id. at 1933. Trial counsel objected to the second supplemental charge and asked the trial court to instead "send the original response the Court had regarding intentionally and knowingly ... [a]nd wait ... until the jury indicates they can't reach ... a resolution. And then at that point, submit the other special charge, if it's called for." Trial Tr. vol. 20 at 53, ECF No. 11–22. The trial court overruled the objection and sent the instruction to the jury. *Id.*

2. *Analysis*

In reviewing an ineffective assistance of appellate counsel claim, a court must determine (1) whether appellate counsel's performance was deficient, and (2) whether appellate counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. To establish deficient performance, a petitioner must show that "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Smith v. Robbins*, 528 U.S. 259, 287, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). To show prejudice, the petitioner must establish "a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." *Id.* "Counsel need not raise every nonfrivolous ground of appeal, but should instead present '[s]olid, meritorious

arguments based on directly controlling precedent.' " *Schaetzle v. Cockrell*, 343 F.3d 440, 445 (5th Cir.2003) (citing *United States v. Williamson*, 183 F.3d 458, 463 (5th Cir.1999)).

***22** Davila argues that the trial court's second supplemental charge "contained an incorrect statement of the law because it failed to recognize that in Texas one must have the specific intent to murder at least two people to be guilty of capital murder; it is not enough that a person attempted to murder a single person, and accidentally killed two." Am. Pet. 82–83, ECF No. 17. Davila asserts Thornton was ineffective for failing to raise this issue on direct appeal.

The language given in the trial court's second supplemental instruction is taken from section 6.04 of the Texas Penal Code, which reads "[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that ... a different person or property was injured, harmed, or otherwise affected." Tex. Penal Code Ann. § 6.04 (West 2013). Trial counsel objected to this instruction on the basis that the trial court should delay the charge until after the jury deliberated further, not on the basis that the instruction was an incorrect statement of law.

Respondent argues that this failure to object waived any error for appeal and that Thornton cannot be ineffective for failing to raise a claim that was not preserved for appeal in the first instance. Resp. 61, ECF No. 29. Davila argues that trial counsel's failure to object does not preclude appellate review of jury charge error, but only increases the degree of harm necessary for reversal. Am. Pet., 85. Specifically, Davila argues that, under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App.1985), jury charge error that is not preserved requires "egregious harm" for reversal, as opposed to a "some harm" standard when the error is preserved. As explained below, the Court finds no error in the charge and that any alleged error did not result in harm under either *Almanza* standard.

A Texas trial court may instruct the jury on the law of transferred intent as applied in a capital murder prosecution. *See Roberts v. State*, 273 S.W.3d 322, 331 (Tex.Crim.App.2008). Davila argues that the second supplemental instruction in this case was erroneous only because it violated the rule in *Roberts* that a defendant convicted of multiple-murder capital murder must have the necessary mental state (intent or knowledge) with respect to the number of victims killed. To ascertain whether the jury instruction was error, the Court examines the "charge as a whole instead of a series of isolated and unrelated statements." *Dinkins v. State*, 894 S.W.2d 330, 339 (Tex.Crim.App.1995). The "transferred intent" instruction was not given to the jury in isolation; it was given to the jury along with the language taken from the court's charge that repeated the statutory definitions for "intentionally" and "knowingly" as well as the application paragraph for capital murder. Clerk's R. vol. 9, 1932–33, ECF

No. 10–44. In Texas, the application paragraph is the portion of the charge that authorizes conviction. *Yzaguirre v. State*, 394 S.W.3d 526, 530 (Tex.Crim.App.2013). The application paragraph for capital murder clearly required that the jury find Davila caused two intentional or knowing deaths in the same criminal transaction. In the event the jury found that Davila killed only one person, the application paragraph did not allow the jury to convict Davila of capital murder. Thus, the jury charge, taken as a whole, does not violate the rule in *Roberts*.

*23 More to the point, the CCA specifically distinguished the facts of this case from *Roberts*, where the victim was a woman who, unknown to the defendant, was pregnant. The CCA noted that, in contrast, Davila intended to kill "the fat dude in the middle of the street" and three "guys on the porch," or, in other words, "four males, not two females." *Davila*, 2011 WL 303265, at *4. Any error in the charge was, therefore, harmless, because *Roberts* is not implicated: Davila intended to kill more people than he actually did.

Given the foregoing, the record does not show that Thornton unreasonably failed to discover a non-frivolous issue for appeal and does not show that the issue would have prevailed on direct appeal. Claim Three and Four are denied.

VI. FOURTH & FOURTEENTH AMENDMENTS– ADMISSION OF WRITTEN STATEMENTS (CLAIMS 5 & 6)

Davila next contends that the trial court erroneously admitted three of his written statements admitting to the commission of the capital murder offense and another of his statements admitting to the commission of an extraneous murder offense. Am. Pet. 103, ECF No. 17. Davila contends that the admission of these statements was erroneous under the standard set forth in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and against his rights under the Fourth and Fourteenth Amendments to the United States Constitution. *Id.* In response, Respondent argues that this Court is prevented from reviewing such alleged error under *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), because Davila had a "full and fair opportunity to litigate his Fourth Amendment claim [in state proceedings] and exercised the opportunity to do so." Resp. 68–69, ECF No. 29. In reply, Davila contends that *Stone* does not apply. Reply 26–31, ECF No. 33.

A. Applicable Law

In *Stone v. Powell*, the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Davila argues that the Supreme Court's holding in *Stone* does not apply in capital cases, and that the Supreme Court has exclusively applied the rule in non-capital cases. Reply 27, ECF No. 33. However, the Fifth Circuit

has applied *Stone* to capital cases involving the death penalty and determined that it was prevented from reviewing a petitioner's Fourth Amendment claim as a result. *See ShisInday v. Quarterman*, 511 F.3d 514, 524–25 (5th Cir.2007) ("The Fifth Circuit applies the [*Stone*] bar as long as the state gives the defendant an opportunity to litigate the issue, whether or not the defendant takes advantage of the opportunity.") (citing *Janecka v. Cockrell*, 301 F.3d 316, 320–21 (5th Cir.2002)); *Busby v. Dretke*, 359 F.3d 708, 722 (5th Cir.2004) (noting Fourth Amendment claims are not cognizable in federal habeas corpus proceedings pursuant to *Stone*); *Jones v. Johnson*, 171 F.3d 270, 278 (5th Cir.1999) ("The state provided an opportunity for full and fair litigation of [petitioner's] fourth amendment claim prior to trial; we cannot reexamine this claim on federal *habeas* review."). The Court now turns to a review of the state court proceedings to determine whether Davila received a full and fair opportunity to litigate the Fourth Amendment issues of which he now complains.

B. Analysis

*24 The Supreme Court in *Franks v. Delaware* held that a defendant may challenge an affidavit supporting a search warrant on Fourth Amendment grounds if the defendant establishes that (1) misrepresentations within the affidavit are the product of "deliberate falsehood or deliberate disregard for the truth," and (2) that the statements were necessary to establish probable cause. 438 U.S. 154, 171–72, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Here, during the state court proceedings, Davila moved to suppress "any and all oral and written statements of the Defendant in this cause, which were made to agents of the State." Clerk's R. vol. 1 (Mot. Suppress Statements), ECF No. 10–3. Davila further moved to suppress "the arrest warrant in this cause based on the affiant's knowing or intentional false statements or based on the affiant's disregard for the truth in making false statements." Clerk's R. vol. 9 (Mot. Suppress Arrest Warrant), ECF No. 10–44 (emphasis removed). The state trial court held a hearing and heard evidence regarding the validity of the arrest warrant and the voluntariness of the statements Davila gave while in custody. Trial Tr. vol. 16 at 170–288, ECF No. 11–18. The state trial court overruled each of Davila's motions regarding the validity of the arrest warrant and the voluntariness of his statements. *Id.* at 244:19–21, 299:2–6. Later during his trial, Davila again objected to the validity of his arrest warrant. *Id.* at 37:9–16. The state court provided an alternative basis for its original ruling denying Davila's motion to suppress. *Id.* at 37:20–25, 38:1–20. The issue was then submitted to the jury. The jury was instructed that, if they had a reasonable doubt about whether the affidavit for arrest contained sufficient probable cause to support Davila's arrest, they could not consider the arrest or any evidence derived from it. Clerk's R. vol. 9, 1923–24, ECF No. 10–44. The trial court's ruling was affirmed on appeal.

Because Davila was afforded a full and fair opportunity to litigate the Fourth Amendment issue, and did in fact litigate the issue, the Court finds that *Stone* applies to

bar this Court's review of the issue in the instant federal habeas proceedings. *Stone*, 428 U.S. at 494. As a result, the Court denies Claims Five and Six. *See id.*

VII. FIFTH, SIXTH, & FOURTEENTH AMENDMENTS– ADMISSION OF WRITTEN STATEMENTS (CLAIMS 7 & 8)

Davila next contends that the trial court erroneously admitted all four of his written statements because they were made involuntarily, in violation of the Fifth, Sixth, and Fourteenth Amendments. Am. Pet. 111, ECF No. 17. He argues that the statements were not given voluntarily because, as he was interrogated for seven hours, he did not have anything to eat or drink and did not use the restroom. *Id.* at 114–115. Respondent maintains that the statements were not coerced and were instead offered voluntarily. Resp. 76, ECF No. 29. Alternatively, Respondent states that even if the statements were obtained in violation of Davila's Fifth Amendment rights, "the Court must still deny relief because the admission did not have a substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 77. This claim was raised and rejected on direct appeal; thus, AEDPA deference applies.

A. Applicable Law

*25 In determining the voluntariness of a confession under the Fifth Amendment, a reviewing court applies the "totality of the circumstances" approach. *Rogers v. Quarterman*, 555 F.3d 483, 491 (5th Cir.2009). That is, the court considers "the suspect's age, experience, education, background, intelligence, and whether the suspect has the capacity to understand the warnings given to him, the nature of his rights, and the consequences of waiver." *Id.* The court further considers "[t]he circumstances of the interrogation, such as its length, location, and continuity." *Id.* . "A statement is involuntary if there existed official, coercive conduct that made it unlikely the statement was a product of the individual's free choice." *Id.* The Supreme Court has opined that "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n. 20, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

"The voluntariness of a confession is ultimately a legal determination ... [that] may also involve subsidiary factual determinations and mixed issues of law and fact." *Barnes v. Johnson*, 160 F.3d 218, 222 (5th Cir.1998). As a result, this Court will defer to the state court's determination of voluntariness as long as it was not "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.*; 28 U.S.C. § 2254(d)(1).

B. The Interrogation

In its analysis, the CCA set forth the following facts surrounding Davila's written confessions:

Detective Johnson testified that [Davila] was arrested and brought to the police station at about 1:40 p.m. on April 8th. Detectives Johnson and Boetcher met with him in an interview room where [Davila's] handcuffs were removed and he was placed in leg cuffs. He began the interview by asking [Davila] if he wanted "anything to eat or drink or anything like that. He said no. I do it that way every time. And then I advised him of his Miranda rights." [Davila] told Detective Johnson that he understood his rights and that "he freely, intelligently and voluntarily waive[d] those rights" and agreed to talk with the officers. "He was very relaxed. Just sat there kind of casual." [Davila] gave his first statement beginning at 4:00 p.m. and ended it at 4:25. He gave the second statement beginning at 6:47 p.m. and completed it at 7:22. The officers began taking the third statement at 7:38 p.m. and concluded it at 8:12. Detective Johnson said that he did not do anything to deny [Davila] his basic needs, did not prevent him from having liquids or food, and did not prevent him from going to the restroom. He took a picture of [Davila] lounging casually in his chair in the interview room. [Davila] does not appear to be under any stress or duress.

***26** On cross-examination, Detective Johnson again said that [Davila] appeared very relaxed; "[t]he whole thing was extremely friendly." [Davila] "never asked to go to the bathroom"; he never asked for fluids or food. Detective Johnson reiterated that he had offered, but [Davila] turned him down.

Detective Boetcher also testified and said that [Davila] gave his fourth statement beginning at 8:45 p.m. and completed it at 9:06. He said that [Davila] had used the restroom, but he did not specify when.

The trial judge entered oral findings into the record and stated, inter alia,

> [Davila] was offered nothing in exchange for these three statements. There was no force, threats, or coercion made by the police. He was lucid. Did not appear intoxicated. Never asked for a-food or for anything to drink.
>
> The court finds that the statements are freely and voluntarily made and are admissible.

Davila, 2011 WL 303265, at *7–8.

C. Analysis

Here, both state courts determined that Davila's confession was made voluntarily and knowingly without threats or coercion. The Court defers to those determinations unless Davila can prove otherwise by clear and convincing evidence. In his briefing, Davila again argues that because he was questioned for seven hours and "did not ask to use the restroom and was not given anything to eat or drink" his confession was involuntary. Am. Pet. 113, ECF No. 17. He fails, however, to establish how those facts demonstrate the involuntariness of his confession or offer any additional evidence of coercive or improper activity. Davila simply asks this Court to disagree with the state court's ruling by rearguing

the issues. The state trial court determined that Davila was offered nothing in exchange for the first three statements he gave; that the police did not force, threaten, or coerce Davila's confessions; that he was lucid and did not appear intoxicated; and that he never asked for food or anything to drink. Trial Tr. vol. 16 at 302:22–25, 303:1–3, ECF No. 11–18. Regarding the fourth statement, the state trial court found that Davila "[a]gain during that period of time, ... requested nothing" and that the statement was given freely and voluntarily. *Id.* at 303:12–13, 16–18. A state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Because Davila has failed to establish that the state court unreasonably rejected his claim that police coercion rendered his confession involuntary, Claims Seven and Eight are denied. *See* 28 U.S.C. § 2254; *Shisinday v. Quarterman*, No. H–06–814, 2007 WL 776680, at *23 (S.D.Tex.2007).

VIII. CONSTITUTIONALITY OF TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 37.071 (CLAIM 9)

Davila contends that the trial court erred by denying Davila's motion to preclude the death penalty as a sentencing option and declare Texas Code of Criminal Procedure Article 37.071 unconstitutional. Am. Pet. 116, ECF No. 17. Specifically, he argues that Article 37.071 is unconstitutional because it "allows for a death sentence without grand jury review of the punishment special issues in violation of the Fifth and Fourteenth Amendments." *Id.* In response, Respondent states that the Constitution does not require Texas's special sentencing issues to be presented in the indictment before the grand jury. Resp. 77, ECF No. 29. The state court rejected this claim on the merits on direct appeal.

A. Analysis

*27 The Fifth Amendment to the United States Constitution provides, in relevant part, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...." U.S. Const. amend. V. In *United States v. Robinson*, the Fifth Circuit held that, with respect to federal cases, "the government is required to charge, by indictment, the statutory aggravating factors it intends to prove to render a defendant eligible for the death penalty, and its failure to do so ... is constitutional error." 367 F.3d 278, 284 (5th Cir.2004).

Davila argues that the *Robinson* holding extends to state-court prosecutions and requires that the aggravating and mitigating factors that a jury must consider in the sentencing phase of trial must be alleged in the indictment. Am. Pet. 117–18, ECF No. 17. Davila further asserts that "[r]elying on the Supreme Court's decision in *Ring v. Arizona*, the court in *Robinson* held that the Fifth Amendment demands that aggravating factors that render a defendant eligible for the death penalty are, in fact, elements of the offense," thus, "the government is required to charge, by indictment, those statutory aggravating factors." *Id.* at 116–

17. In turn, Respondent contends that the *Robinson* holding only applies to federal-court prosecutions. Resp. 78, ECF No. 29. Further, "[t]he special issues addressed at the punishment phase have nothing to do with the eligibility determination [to receive the death penalty], but instead are designed to narrow the jury's discretion in making the ultimate decision whether to impose a death sentence." *Id.* at 80.

As the CCA correctly stated, the Fifth Amendment right to an indictment in felony cases has yet to be extended to the states through the Fourteenth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). The Fifth Circuit has additionally noted that "in *Robinson*, [the court] addressed only the requirement of a grand jury indictment in a federal prosecution." *Kerr v. Thaler*, 384 F. App'x 400, 403 (5th Cir.2010). Neither the Fifth Circuit nor the Supreme Court has extended the requirement to the states. *Id.*

Further, in Texas, the eligibility determination regarding the death penalty is made at the guilt phase of trial according to the elements that were alleged in the indictment. *See Lowenfield v. Phelps*, 484 U.S. 231, 245–46, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Texas Penal Code Section 19.03 sets forth the elements to establish capital murder, which are the aggravating factors that could render an individual eligible for the death penalty. The special issues addressed during the punishment phase of trial do not apply to the eligibility determination, but rather apply to narrow the jury's discretion in making the ultimate decision whether to impose a death sentence. *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) ("By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function."). As such, special issues are not an element of the offense that must be included in the indictment. *Granados v. Quarterman*, 455 F.3d 529, 536–37 (5th Cir.2006); *Rowell v. Dretke*, 398 F.3d 370 (5th Cir.2005); *Anderson v. Quarterman*, 204 F. App'x 402, 409 (5th Cir.2006). For these reasons, the Court finds that the CCA's determination was not an unreasonable application of Supreme Court precedent and this claim is denied on the merits. *See* 28 U.S.C. § 2254(d).

IX. CONSTITUTIONALITY OF TEXAS'S "10–12"[9] RULE (CLAIM 10)

***28** Davila next argues that the trial court erred by overruling his objection to the constitutionality of Texas's "10–12 Rule." Am. Pet. 130, ECF No. 17. Specifically, Davila maintains that Texas's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments. *Id.* In response, Respondent contends that Davila fails to demonstrate that the CCA's determination resulted in an unreasonable application of clearly established Supreme Court precedent. Resp. 81, ECF No. 29.

A. Applicable Law

Article 37.071 of the Texas Code of Criminal Procedure provides, in relevant part:

> (e) (1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:
>
> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.
>
> ...
>
> (f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:
>
> (1) shall answer the issue "yes" or "no";
>
> (2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree

Tex.Code Crim. P. art. 37.071 § 2(e)-(f).

B. Risk of Arbitrariness–Eighth & Fourteenth Amendments

Davila first argues that "[t]he 10–12 Rule affirmatively creates confusion in the minds of the jurors" because they "are first told that the jury as a whole 'shall' answer 'yes' or 'no' to each issue presented" then they "are subsequently told that ten or more jurors must be in agreement to give one set of answers and that they must be unanimous in order to give another." Am. Pet. 132, ECF No. 17. The statute provides, however, that the jury's inability to answer a special issue shall result in a life sentence. Tex.Code Crim. P. art. 37.071, § 2(g). And, section 2(a)(1) prohibits the court or counsel from informing the jury of the effect of a failure to agree on the special issues submitted. Tex.Code Crim. P. art. 37 .071, § 2(a)(1). As a result, jurors are not informed that a single juror could prevent the imposition of the death penalty, which is in violation of his Eighth and Fourteenth Amendment rights. *Id.*

The Supreme Court has rejected this argument in *Jones v. United States.* 527 U.S. 373, 381–83, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) ("In light of the legitimate reasons for not instructing the jury as to the consequences of deadlock, and in light of congressional silence, we will not exercise our supervisory powers to require that an instruction of the sort petitioner sought be given in every case."). In *Jones,* the Court held that a jury need not be told what happens procedurally when a verdict cannot be reached. *Id.* Although the jury cannot be "affirmatively misled regarding its role in the sentencing process," a court is not required to instruct the jury "as to the consequences of a breakdown in the deliberative process." *Id.* at 381–82. The instruction in Davila's case accurately recited the governing law. This sub-claim is denied on the merits. 28 U.S.C. § 2254(d).

C. Right to Individualized Sentencing–Eighth Amendment

*29 Davila next contends that he was denied his Eighth Amendment right to individualized sentencing because the 10–12 Rule misleads jurors regarding their individual ability to give effect to their belief on mitigating circumstances. Am. Pet. 140–44, ECF No. 17. Specifically, "[b]y instructing the jury that ten jurors are required in order to give a 'yes' answer, the Texas statutes ... prevent individual jurors from having a meaningful opportunity to consider mitigating factors." *Id.* at 144. In support, Davila cites to *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1998). In *Mills*, the Supreme Court determined that the jury instructions violated the Eighth Amendment because they may have prevented the jury from considering mitigating evidence unless the jurors unanimously agreed that a particular circumstance was supported by the evidence. *Id.* at 384. The Supreme Court has since explained that "*Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." *McKoy v. North Carolina*, 494 U.S. 433, 422–43, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). Further, the Fifth Circuit has determined that *Mills* is not applicable to the capital sentencing scheme in Texas. *See Druery v. Thaler*, 647 F.3d 535, 542–43 (5th Cir.2011) (noting that the Fifth Circuit has refused to invalidate the Texas sentencing scheme based on the *Mills* decision); *Miller v. Johnson*, 200 F.3d 274, 288 (5th Cir.2000); *Jacobs v. Scott*, 31 F.3d 1319, 1329 (5th Cir.1994) ("Under the Texas system, all jurors can take into account any mitigating circumstance. One juror cannot preclude the entire jury from considering a mitigating circumstance. Thus, *Mills* is inapplicable."). As a result, the Court denies this sub-claim on the merits. *See* 28 U.S.C. § 2254(d).

D. Right to Fair and Impartial Jury–Sixth Amendment

Finally, Davila argues that the 10–12 Rule "forces the jury to wonder what would happen were they ... unable to answer the special issues, possibly leads them to believe that an unacceptable third alternative other than life and death would follow, and then leaves them to draw upon their own preconceived notions in coming to a verdict." Am. Pet. 146, ECF No. 17. Davila appears to extend the arguments advanced with respect to the Eighth Amendment to the instant argument. Davila fails to offer any new case law or arguments apart from those that he previously offered. The Court previously found that Davila's arguments under the Eighth Amendment were without merit. *See* Part IX.C. Consequently, Davila has failed to carry his burden under 28 U.S.C. § 2254(d), and Claim Ten is denied.

X. JURY INSTRUCTION–BURDEN OF PROOF ON MITIGATION SPECIAL ISSUE (CLAIM 11)

Davila argues that the trial court erred by denying his motion seeking to instruct the jury regarding the burden of proof on the mitigation special issue. Am. Pet. 148, ECF No. 17. Davila contends that the court should have instructed the jury that the

burden regarding the mitigation issue lies with the State. *Id.* In response, Respondent maintains that there is no constitutional requirement for the State to prove an absence of mitigating evidence. Resp. 85, ECF No. 29.

A. Applicable Law

*30 Under Texas law, once a defendant is found guilty of capital murder, the jury is tasked with answering two special issues to determine whether the defendant will receive the death penalty. Specifically, the jury must answer the special issues unanimously to impose a death sentence. Tex.Code Crim. Proc. Ann. art. 37.071 § 2. The first of the two special issues requires the jury to assess the future dangerousness of the defendant. *Id.* § 2(b). The State must prove this issue beyond a reasonable doubt. *Id.* § 2(c). After answering the first special issue, the jury then addresses the issue of mitigation. *Id.* § 2(e)(1). The mitigation issue assigns no burden of proof. *Id.*

B. Analysis

Davila states that "[b]ecause [a negative answer to] the mitigation issue in the Code of Criminal Procedure Art. 37.071 § 2 (Special Issue Number Two) increases the maximum penalty for the crime of capital murder, Texas' statutory scheme is unconstitutional for not requiring this issue to be submitted, proved, and found by the jury beyond a reasonable doubt." Am. Pet. 149, ECF No. 17. The Fifth Circuit has addressed this issue and determined that "no Supreme Court or Circuit precedent requires mitigation to be proved beyond a reasonable doubt." *Kerr*, 384 F. App'x at 403; *Rowell*, 398 F.3d at 378. As a result, this claim is denied on the merits.

XI. REQUEST FOR HEARING

This Court previously denied without prejudice Davila's request for a hearing on Claims 2, 3 and 4 and stated that it would *sua sponte* consider whether a hearing is appropriate after a more thorough evaluation under the AEDPA. This Court has discretion to grant an evidentiary hearing if one is not barred under § 2254(e)(2). *Landrigan*, 550 U.S. at 473. In exercising that discretion, the Court considers whether a hearing could enable Davila to prove the petition's factual allegations which, if true, would entitle him to relief. *Landrigan*, 550 U.S. at 474. The Court also must consider the deferential standards in § 2254(d), which limit the Court's ability to grant habeas relief. *Id.* In practical effect, if the state-court record precludes habeas relief under the limitations of § 2254(d), a district court is not required to hold an evidentiary hearing. *Id.*; *Pinholster*, 131 S.Ct. at 1399.

Claim 2 was adjudicated on the merits and the state court's ruling was determined to be reasonable. 28 U.S.C. § 2254(d). Claim 3 is procedurally barred, with no available avenue excusing the default, and Davila fails to allege any facts that, if true, would entitle him to relief on that claim. Davila also failed to demonstrate that the ineffective assistance of state habeas counsel alleged in Claim 4 is relevant to the procedural or substantive viability of Claims 2 and 3. Habeas relief is therefore precluded by § 2254(d) and § 2254(b), rendering a hearing on these claims

inappropriate. *See Pinholster*, 131 S.Ct. at 1400–01; *Reed*, 739 F.3d at 778 n. 16.

XII. CONCLUSION

*31 Based on the foregoing, the Court **DENIES** Davila's petition for a writ of habeas corpus. In accordance with Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), and after considering the record in this case, the Court denies Davila a certificate of appealability because he has failed to make a substantial showing of the denial of a constitutional right. *See Miller–El v. Cockrell*, 537 U.S. 322, 338, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483–84, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); 28 U.S.C. § 2253(c)(2). If Davila files a notice of appeal, he may proceed in forma pauperis on appeal. 18 U.S.C. § 3006A(7).

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 1808689

Footnotes

1 Robert Ford was unavailable to testify as a witness during the state habeas proceeding as he passed away weeks before the state habeas proceeding. State Habeas Rep. R. (vol.2) 27.

2 In her affidavit, Keene noted that she and Ford spoke with the following members of Davila's family: (1) his mother, Sheila Olivas; (2) his father, Mario Davila; (3) his sisters, Emily Davila, Cynthia Olivas, and Vivianna Olivas; (4) Emily Davila's mother-in-law, Lisa Wallace; (5) his girlfriend, Nicole Blackwell; (6) his aunts, Debra Jones and Angie Jones; and (7) Mario Davila's mother, brother, and niece. State Habeas Clerk's R. (vol.2) 274–78.

3 The officer testified that "OC Spray" is a form of pepper spray. *Id.* at 134:13–17.

4 An officer defined a shank as "a piece of metal or something sharp, hard ... wrapped with cloth at the bottom to protect from unintentional injuries by the user," which is typically used as a weapon. *Id.* at 70:24–25, 71:1–4.

5 The term ADHD was later defined as "attention deficit hyperactivity disorder." *Id.* at 213:1–4.

6 Jones testified that because Davila constantly wore red clothing, she was concerned he was involved in gang-related activity. *Id.* at 122:23–25, 123:1–2.

7 For example, Davila missed 20 days of school during his fifth grade year and 40 days of school during his ninth grade year. *Id.* at 201:15–16, 205:16–21.

8 To the extent Davila may be asserting the ineffective assistance of state habeas counsel as a substantive claim for relief, it is barred by Section 2254(i). 28 U.S.C. § 2254(i) (providing that the ineffectiveness or incompetence of counsel during state collateral post-conviction proceedings shall not be a ground for relief).

9 The "10–12" Rule, as used in the parties' briefing and throughout this Order, refers to Article 37.071, § 2(f)(2) of the Texas Code of Criminal Procedure.

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RECORD AND BRIEFS

No. 16-6219

IN THE
Supreme Court of the United States

ERICK DANIEL DAVILA,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. The Fifth Circuit Court of Appeals denied the petitioner a certificate of appealability to appeal an ineffective-assistance-of-appellate-counsel claim that was rejected as procedurally defaulted and meritless. Should the Court grant certiorari to consider whether the equitable rule established in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Texas*, 133 S. Ct. 1911 (2013), can serve as cause to overcome the default where the underlying claim has no merit and the petitioner has already received the only remedy available under *Martinez*—federal habeas review of an otherwise defaulted claim?

2. Texas's capital sentencing scheme requires jurors to make all factual determinations necessary for a death sentence. Should the Court grant review to consider whether, in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), Texas's mitigation special issue—which offers the jury the opportunity to impose a life sentence instead of death—must be found by a jury beyond a beyond a reasonable doubt?

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RESPONDENT'S BRIEF IN OPPOSITION

In February 2009, a Texas jury convicted Erick Daniel Davila of capital murder and sentenced him to death. Davila had armed himself with a high-powered semiautomatic SKS assault rifle equipped with an infrared scope and opened fire on a crowd of largely women and children attending a birthday party at a home in Fort Worth, Texas, killing Annette Stevenson and her five-year-old grandchild, Queshawn Stevenson. Davila now petitions this Court for a writ of certiorari, complaining that the Fifth Circuit erred in denying him a certificate of appealability (COA) to appeal the denial of habeas corpus relief on a claim of ineffective assistance of appellate counsel (IAAC) that was rejected as procedurally defaulted and meritless; and a claim challenging Texas's mitigation special issue under *Apprendi*, *Ring*, and *Hurst*,[1] that was denied for lack of merit.[2] Davila is unable to present any important reason to grant review. The district court's resolution of his claims is consistent with federal habeas jurisprudence, and would not be debated by jurists of reason.

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[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring. v. Arizona*, 536 U.S. 584 (2002); *Hurst v. Florida*, 136 S. Ct. 616 (2014).

[2] *Davila v. Stephens*, No. 4:13-cv-506-O, 2015 WL 1808689 (N.D. Tex, April 21, 2015) (Memorandum Opinion and Order); *Davila v. Davis*, No. 15-70013, 2016 WL 317870 (5th Cir. May 31, 2016) (unpublished). The district court's opinion is Davila's Appendix (App.) B and the Fifth Circuit's decision is Davila's App. A.

The Court should therefore deny certiorari review.

STATEMENT OF THE CASE

I. The Evidence at Trial

The district court provided the following summary of the evidence of Davila's capital crime:

> On April 6, 2008, eleven-year-old Cashmonae Stevenson, along with numerous friends and relatives, celebrated her sister Nahtica's ninth birthday at a "Hannah Montana" birthday party at her grandmother's home in the Village Creek Townhouses in Fort Worth.[3] Except for Cashmonae's uncle, Jerry Stevenson, all of the guests were women and children. About 8:00 p.m., just as the fifteen children were eating ice cream and cake on the front porch, Cashmonae saw a black Mazda slowly drive by. Inside was a man holding a gun with "a red dot" on it. Cashmonae "felt in her stomach" that something bad was going to happen because "no one ever rolled by with a gun pointed towards our house." Her uncle Jerry said, "The fool has a K in the car."[4] And then Cashmonae heard her grandmother, Annette Stevenson, say, "They trying to find trouble."
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> A few minutes later Cashmonae saw a man run across the field, stand next to the house in front of theirs, and start shooting with "the red dot" pointed at their porch.[5] He kept shooting at them as

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[3] This neighborhood was known for gang-related violence, frequently between the Bloods, who used red as their "color," and the Crips, who used blue.

[4] Jerry later testified that he thought the rifle was an AK-47; in fact, it was an SKS. The two rifles are similar in appearance and function.

[5] Jerry Stevenson testified that he saw the gunman, dressed all in black, shooting at them, so he grabbed his son's hand, pulled him into the house, and threw him into a corner to protect him as he saw his mother stagger through the door and walk toward her bedroom. When Jerry saw that his daughter, Queshawn, was not

> the children and adults "stacked up on top of each other" as they tried to run through the front door. They were all screaming and trying to get to safe places inside. Cashmonae saw her uncle, Jerry Stevenson, lay his five-year-old daughter, Queshawn, down on the sofa. She was bleeding and looked dizzy. According to Jerry, "her guts was hanging out." After the gunshots ended, Cashmonae discovered that she had been shot in the elbow, the hand, and the shoulder. Nahtica and another little girl, Brianna, as well as Sheila Moblin, one of the adults at the party, had also been shot. Cashmonae's grandmother, Annette, had been killed, as had five-year-old Queshawn.
>
> * * *
>
> By the time the first police officer arrived, it was a chaotic scene. There was a dead woman—Annette Stevenson—in the back bedroom, a seriously injured child—Queshawn—on the couch in the living room, two more children with leg wounds in the dining room, blood splattered everywhere, and both adults and children screaming and trying to help or console the wounded and each other. Crime scene officers found four shell casings beside the air conditioning unit across the street and four more scattered in the street where the second series of shots had been fired. They photographed the bullet holes found all along the porch walls and in the windows of the Stevenson home.

Davila's App. B at *1-2 (citing *Davila v. State*, No. AP-76,105, 2011 WL 303265, at *1-3 (Tex. Crim. App. Jan. 26, 2011) (unpublished) (footnotes in original but omitted by the district court). The Fifth Circuit provided this additional account of the evidence at trial:

> A police investigation led to the arrest of Davila, who gave four

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inside, he ran to the door, and saw her lying on the front porch. He ran out, picked her up, and carried her back inside.

> written statements over the course of seven hours in custody after his arrest. Davila was a member of the Bloods gang. Davila's third statement included admissions that he and his friend had been driving around in his girlfriend's black Mazda and decided to have a "shoot em up." [Davila] said he was trying to shoot "the guys on the porch and ... trying to get the fat dude." He stated he did not know the name of the "fat dude," but recognized him. As for the "guys on the porch," Davila appeared to have mistaken some of the adult women at the party for men because the only male at the party was Jerry [Stevenson]. This confession, along with other evidence, was presented at Davila's trial and led to his conviction.

Davila's App. A at *1.

II. The Evidence at Punishment

Davila does not challenge the sufficiency of the evidence presented by the parties during the punishment phase. As summarized by the Fifth Circuit:

> At the punishment phase, the State introduced aggravating evidence: Davila had attempted to escape from jail and seriously injured a detention officer in the process; he had committed an aggravated robbery and an additional murder only two days before the birthday party shooting; he also had been convicted for burglary of a habitation in 2006.
>
> For the mitigation case, the defense offered testimony from Davila's father, sister, mother, maternal aunts, and a psychologist, Dr. Emily Fallis. In summary, they testified that Davila had been raised solely by a teenage mother, with his alcoholic father having been incarcerated for murder since he was very young. Davila's mother told him that he was conceived when his father sexually assaulted her. She was neglectful, abusive, and hateful towards Davila and his sister, and even made them leave the house as teenagers. Davila's sister testified about physical fights she had with their mother. After deliberation, the jury returned a sentence of death.

Davila's App. A at *1.

III. Procedural History

Davila was convicted of capital murder in February 2009, for intentionally killing more than one person in the same criminal transaction. Davila's App. E. Following a separate punishment hearing, the jury answered "yes" to the special sentencing issue on future dangerousness and "no" to the issue on mitigation. Tex. Code Crim. Proc. art. 37.071, §§ (2)(b)(2) & (2)(e). Based on the jury's answers, the trial court sentenced Davila to death. *State v. Davila*, No. 1108359D (Crim. Dist. Ct. No. 1, Tarrant Co., Tex. Feb. 27, 2009).

The Texas Court of Criminal Appeals (TCCA) affirmed Davila's conviction and sentence on direct appeal. *Davila v. State*, No. AP-76,105, 2011 WL 303265, at *10 (Tex. Crim. App. Jan. 26, 2011), *cert. denied*, 132 S. Ct. 258 (2011).[7]

While his appeal was pending, Davila, through court-appointed habeas counsel, filed an application for state writ of habeas corpus. After conducting an evidentiary hearing, the convicting court issued findings and conclusions recommending the denial of habeas relief. Davila's App. C. The TCCA adopted

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[7] A copy of the TCCA's unpublished opinion is Davila's App. D.

the same, noted that two claims were also defaulted, and denied the writ application. *Ex parte Davila*, No. WR-75,356-01, 2013 WL 1655549 (Tex. Crim. App. Apr. 17, 2013) (unpublished), *cert. denied*, 134 S. Ct. 784 (2013).

Davila timely filed a petition for writ of habeas corpus on April 14, 2014, which he subsequently amended. *Davila v. Stephens*, No. 4:13-cv-00506-O (N.D. Tex.) (Pet., ECF No. 16; Am. Pet., ECF No. 17). On April 21, 2015, the district issued a "Memorandum Opinion and Order" in which it denied Davila's amended petition and denied COA. *Id.* (Mem. Op. & Order, ECF No. 38; F. Jdgmt., ECF No. 39); Davila's App. B. The Fifth Circuit, finding that reasonable jurists would not debate the resolution of any of the claims on procedural and/or merits-based grounds, denied COA in an unpublished, per curiam opinion on May 31, 2016. Davila's App. A at *8. Davila petitioned for rehearing, and was denied relief. *Davila v. Davis*, No. 15-70013 (5th Cir. June 28, 2016) (unpublished order). The instant proceedings now follow.

REASONS FOR DENYING THE WRIT

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10. Davila fails to advance a compelling reason for this Court to exercise its certiorari jurisdiction and none exists.

Both the Fifth Circuit and the district court below denied Davila a COA to appeal his federal habeas claims. To obtain a COA for his procedurally-defaulted claim of ineffective assistance on direct appeal, Davila must show that reasonable jurists would debate whether the district court was correct in its procedural ruling and whether his petition states a valid claim on the merits. *Slack v. McDonald*, 529 U.S. 473, 484 (2000). To obtain a COA for his claim that was denied on the merits challenging the constitutionality of Texas's mitigation special issue, Davila must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Davila cannot make the requisite showing for either of his claims.

I. There is No Compelling Reason to Grant Certiorari Review of Davila's Procedurally-defaulted and Meritless IAAC Claim.

On federal habeas review, Davila argued that his counsel on direct appeal was ineffective for failing to recognize and raise a claim that he was convicted through the use of an improper jury instruction on transferred intent. Am. Pet., ECF No. 17 at 81-90.[8] The district court correctly held that

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[8] Davila did not raise the purported jury charge error as a substantive claim for federal habeas relief. *See generally* Am. Pet., ECF No. 17.

the IAAC claim was unexhausted and defaulted, and rejected Davila's argument that *Martinez* and *Trevino* should extend to excuse the procedural bar. App. B at *19-20; *see* Order, ECF No. 34 at 2-4. However, the district court additionally concluded that even if Davila could avoid procedural default, his IAAC claim did not merit relief because he failed to show deficient performance and prejudice. App. B at *20-23. The Fifth Circuit denied Davila a COA, concluding that reasonable jurists could not debate the procedural ruling or the lack of a constitutional violation. App. A at *4.

Davila petitions the Court to grant review of the Fifth Circuit's decision in order to consider whether *Martinez* and *Trevino* "can be seen as cause" to excuse the default of a substantial IAAC claim. Pet. at 16. Davila presents no compelling reason to consider this claim. Davila has waived review of the merits of his IAAC claim and fails to addresses how *Martinez* and *Trevino* apply to the facts of his case. To the extent Davila's claim is properly before this Court, it presents no issue worthy of certiorari because the IAAC claim is undeniably defaulted and meritless.

A. Davila has waived review of his IAAC claim.

To the Fifth Circuit and district court below, Davila argued that his appellate attorney provided ineffective assistance by failing to raise a point of

error on direct appeal complaining that he was convicted by the use of an improper jury instruction. *E.g.*, Am. Pet., ECF No. 17 at 81-90. Although Davila petitions this Court for review of the Fifth Circuit's denial of COA, he does not argue the purported merits of his underlying IAAC claim. *See* Pet. at 16-20. Nor does Davila argue that the district court's procedural bar ruling was factually or legally erroneous. *See id.* Instead, Davila contends that the holding in *Martinez* should be extended to substantial claims of ineffective assistance of appellate counsel. *Id.* at 16-20. However, even then Davila does not argue that his own IAAC claim is substantial, that state habeas counsel was constitutionally ineffective in failing to raise the claim, and that he suffered actual prejudice by habeas counsel's omission.

Davila has waived his underlying IAAC claim, as well as the purported applicability of his *Martinez* and *Trevino*-based arguments, by failing to brief the issues to this Court. *E.g.*,*United States v. Thames*, 214 F.3d 608, 612 n.3 (5th Cir. 2000) (holding that unargued and inadequately briefed issues are waived); *Royal v. Tombone*, 141 F.3d 596, 599 n.3 (5th Cir. 1998) (holding that appellant waived issue inadequately briefed on appeal); *Pyles v. Johnson*, 136 F.3d 986, 996 n.9 (5th Cir. 1998) (holding that issues not raised and argued in the initial brief on appeal are waived); *Cinel v. Connick*, 15 F.3d 1338, 1345

(5th Cir. 1994) (holding same).

B. The Fifth Circuit correctly denied a COA because Davila's IAAC claim is undoubtedly defaulted and meritless.

To obtain a COA, Davila must show that reasonable jurists would debate the district court's procedural-default ruling and its merits-based resolution of the constitutional claim. *Slack*, 529 U.S. at 484. The Court should deny review because Davila's arguments focus solely on the procedural ruling and ignore the second half of the COA standard. *See* Pet. at 16-20. Yet even if the Court were to hold that *Martinez* excuses the default of a "substantial" IAAC claim, Davila's claim is meritless and he has already received the remedy available under *Martinez*—federal habeas review of his defaulted IAAC claim. App. B at *19-23. Because Davila's arguments present no important reason to grant review, the Court should deny his petition for writ of certiorari.

1. The district court was correct in its procedural bar ruling.

Under 28 U.S.C. § 2254(b), a federal court may not grant habeas relief unless the petitioner has first exhausted state remedies with respect to the claim at issue. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). The district court found that Davila failed to exhaust state remedies because he did not present his IAAC claim in state court. App. B at *20 (citing Order, ECF No. 35). Davila

does not dispute this determination.

A procedural default occurs when "the court to which the petitioner would be required to present his claim in order to meet the exhaustion requirement would now find the claims procedurally defaulted." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). The district court determined that Davila's IAAC claim was defaulted because the alleged jury charge error and its absence from the appeal was apparent on the record when Davila's state habeas counsel filed the original habeas application and Texas's subsequent writ bar would prevent Davila from presenting the claim now in state court. App. B at *20 (citing *Coleman*, 501 U.S. at 735 n.1, and Tex. Code Crim. Proc. art. 11.071, § 5)). Davila does not dispute that his IAAC claim is procedurally defaulted.

A procedural bar may be excused by a showing of (1) "cause" and actual prejudice, or (2) fundamental miscarriage of justice. *Smith v. Johnson*, 216 F.3d 521, 524 (5th Cir. 2000). In *Martinez*, the Court held that for substantial claims of ineffective assistance of *trial counsel* that have been defaulted, the ineffective assistance of state habeas counsel may also excuse the procedural bar. *See Martinez*, 132 S. Ct. at 1318; *Trevino*, 133 S. Ct. at 1921 (extending *Martinez* to post-conviction applications filed in Texas).

Davila tried to avail himself *Martinez* and *Trevino* by seeking an extension of holdings in order to excuse his procedural default of his IAAC claim, but the district court correctly rejected his argument. In its Order denying Davila a hearing, the court explained, "Neither the Supreme Court nor the Fifth Circuit has expanded *Martinez* to include this scenario." Order, ECF No. 35 at 4. In its subsequent Memorandum Opinion and Order, the district court cited Fifth Circuit precedent which holds that *Trevino* had been extended to excuse the default of IAAC claims like that urged by Davila. App. B at *20 (citing *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014)).

On appeal, the Fifth Circuit also rejected Davila's attempt to extend *Martinez* to excuse the procedural bar, explaining that *Martinez* made an "unambiguous holding" to the effect that "ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel." App. A at *4 (citing *Reed*, 739 F.3d at 778 n.16 (quoting *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013)). The Fifth Circuit denied COA, concluding that in light of the above-described controlling precedent, reasonable jurists would not debate the district court's conclusion that the claim of error "was procedurally defaulted because Davila failed to exhaust state court proceedings." *Id.* (citing *Blue v. Thaler*, 665 F.3d

647, 669 (5th Cir. 2011) (where arguments "are foreclosed by Fifth Circuit precedent, the correctness of the district court's decision to reject them is not subject to debate among jurists of reason.")).

Davila seeks review of the Fifth Circuit's decision, arguing that the "principles underlying *Martinez*" should apply equally to IAAC claims. *See* Pet. at 16-20. Since Davila encourages the Court to extend *Martinez* to IAAC claims, by definition he cannot show that reasonable jurists would debate the correctness of the district court's procedural default determination based on this Court's then-existing precedent.

In any event, the support relied on by Davila does not give rise to a valid claim that *Martinez* should be extended in the manner he seeks. Initially, Davila cites to a Ninth Circuit opinion that has read *Martinez* as applying to IAAC claims, but the reasoning of that opinion has not been adopted by the Fifth Circuit. Pet. at 17 (citing *Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013)). Davila also cites to Justice Scalia's dissenting opinion in *Martinez* which recognized that the holding might extend to other claims that cannot be raised before the post-conviction stage, but a dissenting opinion speculating on possible unintended consequences is of no avail. *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting)).

Finally, Davila argues that a Circuit split has arisen between the Ninth Circuit's decision in *Nguyen* and decisions from the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits which have declined to extend *Martinez* beyond substantial claims of ineffective assistance of trial counsel. Pet. at 19 (citing *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014); *Hodges v. Colson*, 727f.3d 517, 530-31 (6th Cir. 2013); *Long v. Butler*, 809 F.3d 299, 315 (7th Cir.); *Dansby v. Norris*, 682 F.3d 711, 728-29 (8th Cir. 2012), *rev'd on other grounds*, 133 S. Ct. 2767 (2013); *Banks v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012)). If the Court was willing to address a potential circuit split, Davila's case is not an appropriate vehicle for doing so. The issue on which the split purportedly exists—whether the holding in *Martinez* excuses the procedural default of a substantial claim of appellate-counsel ineffectiveness—has no potential application to Davila. As explained in the following section, the allegedly erroneous jury instruction that serves as the basis for Davila's claim of appellate-counsel ineffectiveness was not properly preserved for review with a trial objection. Davila's claim of jury-instruction error is also not based on any accepted legal interpretation of state law. And most importantly, Davila's IAAC claim was already raised and rejected in federal court on procedural grounds and for lack of merit. As a result, he has already obtained the remedy

that might be available to him if *Martinez* applies to IAAC claims, a review of the merits of his defaulted claim. Under such circumstances, the Court has no reason to grant review.

2. Even if Davila could overcome the procedural default, the district court's assessment on the merits is not debatable.

Davila underlying IAAC claim alleges that his attorney failed to raise a claim on direct appeal that he was convicted based on an improper supplemental jury instruction on transferred intent. *See Am.* Pet., ECF No. 17 at 81-90. As an alternative ruling to the default, the district court reviewed the merits of Davila's claim and, finding no merit, denied habeas relief. App. B at *20-23.[9] Reasonable jurists would not debate the district court's resolution of the constitutional claim.

At trial, the jury was given the following instructions regarding capital murder:

> A person commits an offense of "capital murder" if he commits murder and murders more than one person during the same criminal transaction. A person commits an offense of "murder" if he intentionally or knowingly causes the death of an individual.
> . . .

[9] If a procedural default is excused under *Martinez*, then a federal court may reach the merits of the underlying ineffective assistance of trial counsel claim. To the extent *Martinez* could ever apply to Davila's IAAC claim, he has already received the only remedy offered by *Martinez*—federal habeas review of the merits.

> A person acts "intentionally," or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.
>
> A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> . . .
>
> Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm; and both murders were committed during the same criminal transaction, then you'll find the Defendant guilty of the offense of capital murder.
>
> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of capital murder as charged in the indictment and next consider the lesser included offenses of murder.

Davila's App. E at 1-2.

During their deliberations, the jury sent a note to the trial court asking for the following: "We need a clarification of the capital murder charge. In a capital murder charge, are you asking us did [Davila] intentionally murder the specific victims, or are you asking did he intend to murder a person and in the process took the lives of 2 others." App. E at 9. The trial judge returned a

written response that repeated the definitions of "intentionally" and "knowingly," the charge on capital murder and instruction on reasonable doubt, set out above. *Id.* at 10. The trial court also gave the additional charge on the law as follows:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that a different person was injured, harmed, or otherwise affected.

App. E at 11. Defense trial counsel objected to the second supplemental instruction on the basis that the court should delay the charge until after the jury deliberated further. *See* ECF No. 11 at 22. The trial court overruled the objection and sent the instruction to the jury. *Id.* The jury continued its deliberations and within the hour, sent out a note stating it had reached a verdict. App. E at 12. Davila was ultimately convicted of capital murder.

In his Statement of the Case (but not in the questions Davila presents for review), Davila states that the jury was improperly instructed on Texas's transferred intent law in the capital murder context. Pet. at 5. He states that his attorneys argued at trial that he only intended to shoot his rival, Jerry Stevenson, and therefore he was not guilty of capital murder as multiple intents to kill were necessary for his capital murder conviction for killing two people in the same transaction. *Id.* Making no mention of the applicable legal

standards for reviewing claims of ineffective assistance, Davila states that appellate counsel "was ineffective for failing to raise the jury charge error on direct appeal," and state writ counsel "was ineffective for not raising a clearly meritorious claim [of] ineffective assistance of appellate counsel." *Id.* at 12, 13. Even if Davila had briefed the IAAC claim as an issue for review, he could not show that reasonable jurists would debate the district court's decision to deny habeas relief on the merits.

A criminal defendant is constitutionally entitled to effective assistance on direct appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985). To establish that counsel's performance was objectively unreasonable, Davila must show "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Smith v. Robbins*, 528 U.S. 259, 287 (2000). To show prejudice, Davila must establish "a reasonable probability that, but for his counsel's unreasonable failure" to raise the claim, "he would have prevailed on appeal." *Id.* This does not mean that counsel must raise every non-frivolous ground available. *Schaetzle v. Cockrell*, 343 F.3d 440, 445 (5th Cir. 2003). Only "solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention." *United States v. Williamson*, 183 F.3d 458, 462-63 (5th Cir. 1999).

The district court, reviewing the jury charge as a whole, found no purported error and denied Davila's IAAC claim. App. B at *20-23. As that court concluded, and Davila does not dispute, the complained-of supplemental instruction given the jury tracks the language of Section 6.04 of the Texas Penal Code, which reads "[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . a different person or property was injured, harmed, or otherwise affected." Tex. Penal Code § 6.04. Understandably, defense trial counsel did not lodge an objection to the supplemental charge on the basis that it was an incorrect statement of the law. App. B at *22. Appellate counsel cannot be ineffective for failing to raise a claim of error that was not preserved for appeal and was not erroneous.[10]

Additionally, Davila has previously argued that the supplemental jury instruction violated the rule in *Roberts v. State*, 273 S.W.3d 322, 331 (Tex. Crim. App. 2008),[11] that a defendant must have the necessary mental state

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[10] *See, e.g., Granviel v. State*, 552 S.W.2d 107, 121-22 (Tex. Crim. App. 1976) (preservation of error for review on appeal requires a defendant to object in a timely and specific manner).

[11] In *Roberts*, the TCCA stated that "[t]ransferred intent may be used as to a second death to support a charge of capital murder that alleges the deaths of more than one individual during the same criminal transaction only if there is proof of intent to kill the same number of persons who actually died." 273 S.W.2d at 330.

(intent or knowledge) with respect to the number of victims actually killed. Am. Pet., ECF No. 17 at 74-78. The district court, reviewing the jury charge in its entirety, again found no error:

> The "transferred intent" instruction was not given to the jury in isolation; it was given to the jury along with the language taken from the court's charge that repeated the statutory definitions for "intentionally" and "knowingly," as well as the application paragraph for capital murder. [Davila's App. E at 11-12]. In Texas, the application paragraph is the portion of the charge that authorizes conviction. *Yzaguirre v. State*, 394 S.W.3d 526, 530 (Tex. Crim. App. 2013). The application paragraph for capital murder clearly required the jury to find Davila caused two intentional or knowing deaths in the same criminal transaction. In the event the jury fund that Davila killed only one person, the application paragraph did not allow the jury to convict Davila of capital murder.

App. B at *22-23. Furthermore, the error identified in *Roberts* is not implicated in Davila's case. In addressing Davila's claim of insufficient evidence to support his conviction (a claim not currently before this Court), the TCCA distinguished the facts of Davila's case from those in *Roberts* where the victim was a woman who, unbeknownst to the defendant, was pregnant. App. D at 8-11. There, the intent to kill one person did not transfer to support two killings. In contrast and as summarized in Part I of the Statement of the Case above,

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In 2012, the TCCA clarified that its statement in Roberts "was dictum" and was improvident, reasoning that "[i]t is certainly possible to intend more than once to kill a particular person. *Ex parte Norris*, 390 S.W.3d 338, 341 (Tex. Crim. App. 2012).

Davila's own statement establishes that he went to "a shoot em up" in which he intended to kill "the fat dude . . .in the middle of the street" and "the other 3 [guys] on the porch." Davila intended to kill four males, but shot and killed two females instead, Queshawn Stevenson and Annette Stevenson. Accordingly, Davila's appellate counsel did not provide ineffective assistance by failing to raise a point of error challenging the supplemental jury charge on transferred intent.

Because there is no erroneous jury instruction, the district court rejected Davila's IAAC claim for his failure to show that appellate counsel "unreasonably failed to discover a non-frivolous issue for appeal" and that the issue would have prevailed on direct appeal. App. B at *23. Davila fails to show that reasonable jurists would debate the assessment on the merits of this otherwise insubstantial and procedurally-defaulted claim.

II. There is No Compelling Reason to Grant Certiorari Review to Consider Whether Texas's Mitigation Special Sentencing Issue Withstands Constitutional Scrutiny in Light of *Hurst*.

Davila argues that Texas's death penalty statute, Article 37.071 of the Texas Code of Criminal Procedure, is unconstitutional because jurors are not required to make a finding on the mitigation special issue beyond a reasonable doubt under *Apprendi*, *Ring*, and *Hurst*. *See* Pet. at 20-32. Davila's contentions

present no cert-worthy issue.

In order to obtain a death sentence under Texas law, the State has the burden to prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § (2)(b)(1).[13] If the jury unanimously agrees to answer "yes" this "future dangerousness" special issue, it must then consider whether there are sufficient mitigating circumstances to warrant a sentence of life imprisonment rather than death. *Id.*, § (2)(e)(1).[14] While the jury may not answer this "mitigation special issue" with "no" unless they unanimously agree, *id.*, § (2)(f), the sentencing scheme does not assign a burden of proof for either the defendant or the State to prove or disprove the sufficiency of mitigating circumstances at the punishment phase.

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[13] The jury in Davila's case was given Special Issue Number 1: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" Davila's App. F at 3.

[14] After the jury unanimously answered "'yes" to the future dangerousness issue, Davila's jury deliberated Special Issue Number 2, which asks: "Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character, and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" Davila's App. F at 3.

Davila challenged the constitutionality of Texas's mitigation special issue on direct appeal and federal habeas, raising a Sixth Amendment claim under *Apprendi* and *Ring*. In *Apprendi*, the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and provided beyond a reasonable doubt." 530 U.S. at 490. In *Ring*, the Court held that "[i]f a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." 122 S. Ct. at 2430 (citing *Apprendi*, 530 U.S. at 482-83). Because Texas's capital sentencing scheme is not similar to those encountered in *Apprendi* and *Ring*, the TCCA rejected Davila's claim on the merits, noting it had "repeatedly rejected this argument." *Davila*, 2011 WL 303265, at *10 & n.51 (citations omitted). The federal district court denied habeas corpus relief under AEDPA. App. B at *30 (citing *Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005)). Finding Davila's claim foreclosed by circuit precedent, the Fifth Circuit denied him a COA. App. A at *8 (citing *Rowell*). The appellate court concluded that, "No Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof[,]" and thus reasonable jurists would not debate the lower court's resolution. *See*

id. (quoting *Rowell*, 398 F.3d at 378).

Davila now asks the Court to grant certiorari review of this decision, arguing that the determination that no burden of proof is required for the Texas mitigation special issue conflicts with Supreme Court precedent because a jury's negative answer to the mitigation special issue is a prerequisite to imposition of a death sentence. *See* Pet. at 24-32.[15] Relying on this Court's recent decision in *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016), Davila contends that *Apprendi* applies to any finding necessary for the sentence of death, not just those findings that increase the punishment to death eligibility. Pet. at 20, 23-26.

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[15] Davila additionally argues the Court should grant review because the decisions from the TCCA and Fifth Circuit "are now at odds with those of the Supreme Courts of Delaware and Missouri." Pet. at 32 (citing Sup. Ct R. 10(a), (b)); *see id.* at 26-27, 28-31. Those states are weighing jurisdictions but Texas is not, as explained below. This distinction is fatal to Davila's argument. For example, Davila points out that the Supreme Court of Delaware has recently decided that the state's capital sentencing statute is unconstitutional in light of *Hurst*. *Id.* at 26 (citing *Rauf v. Delaware*, 145 A.3d 430 (Del. 2016)). However, the *Rauf* Court found the statute unconstitutional because it allows a judge to find an aggravating circumstance for the weighing phase, it fails to require unanimity regarding an aggravating circumstance for the weighing phase, it unconstitutionally allows a judge rather than the jury to weigh aggravating and mitigating circumstances, and it fails to require that aggravating circumstances outweigh mitigating circumstances. *Id.* at *1-2. These circumstances do not apply to Texas's capital-punishment system. Whether or not another state may have found constitutional infirmities in its own capital sentencing statute is no reason for the Court to grant certiorari review in this case.

Hurst does not support Davila's argument. In *Hurst*, the Court held that Florida's capital sentencing scheme violated *Ring* because a jury makes an advisory verdict while the judge makes the ultimate factual determinations necessary to sentence a defendant to death." *Hurst*, 136 S. Ct. at 621-22. *Hurst* merely reiterates that juries, not judges, must find all facts of a crime beyond a reasonable doubt. *See Hurst*, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."). In contrast, there are no judicial factfindings in Texas's death-penalty scheme that could enhance a defendant's sentence beyond the prescribed range. *See Granados v. Quarterman*, 455 F.3d 529, 536 (5th Cir. 2006) ("All the elements of capital murder were put to the jury with instruction that the evidence had to persuade them beyond a reasonable doubt. No finding by the judge was required to expose Granados to the death penalty.") Because judges play no factfinding role in Texas's capital-punishment scheme, *Hurst* does not benefit Davila.

Further, in addition to the lack of judicial factfinding, Texas's death-penalty scheme substantially differs from Florida's. Unlike weighing states, in Texas the eligibility determination is made at the guilt-innocence phase of trial according to the elements alleged in the indictment. See *Turner v. Quarterman*,

481 F.3d 292, 299-300 (5th Cir. 2007) ("Texas capital juries make the eligibility decision at the guilt-innocence phase."). This is by virtue of the manner in which Texas defines the offense of capital murder.[16] In order to find a defendant guilty of capital murder in Texas, the jury must find murder *plus* an aggravator or aggravators, and it is this additional finding which renders the defendant death eligible. *See Jurek v. Texas*, 428 U.S. 262, 270 (1976) (Texas statute requires jury to find existence of statutory aggravating circumstance at guilt-innocence phase before death penalty may be imposed). Whether the defendant should be sentenced to death—the selection decision—is then made by the punishment jury at a Texas capital-murder trial.

The principles of *Apprendi* and *Ring* are thus inapplicable to Texas's

---

[16] Under Section 19.03 of the Texas Penal Code, a person commits capital murder if the person commits murder (as defined under Section 19.02(b)(1)), and the murder is committed under one of nine listed circumstances: (1) the person murders a peace officer or fireman who is acting in lawful discharge of an official duty, and who the person knows is a peace officer or fireman; (2) the murder is committed while in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat; (3) the murder is committed for remuneration or promise of remuneration; (4) the person commits murder while escaping or trying to escape from a penal institution; (5) while incarcerated, the person murders someone employed in the operation of a penal institution; (6) while incarcerated, the person murders another individual; (7) the murder is committed against more than one person; (8) the person murders a child under the age of six years old; or (9) the person commits murder in retaliation for, or on account of, the service or status of the other person as a judge or other court personnel. *See* Tex. Pen. Code 19.03(a).

special-issue capital sentencing scheme. The Fifth Circuit has time and again recognized this important distinction and denied relief on such claims. *See, e.g.*, *Allen v. Stephens*, 805 F.3d 617, 627-28 (5th Cir. 2015) (holding that Texas's death penalty scheme does not violate either *Apprendi* or *Ring*), *cert. denied*, 136 S. Ct. 2382 (2016); *Scheanette v. Quarterman*, 482 F.3d 815, 828 (5th Cir. 2007) (holding that Texas's death penalty scheme "did not violate either *Apprendi* or *Ring* by failing to require the State to prove beyond a reasonable doubt the absence of mitigating circumstances."); *Turner*, 481 F.3d at 299-300 (*Ring* is "inapposite to any discussion of the constitutional requirements of the selection phase."); *Granados*, 455 F.3d at 536-37 (holding that Texas did not violate any principle of *Apprendi* or *Ring* by not asking the jury to find an absence of mitigating circumstances beyond a reasonable doubt because "a finding of mitigating circumstances reduces a sentence from death, rather than increasing it to death."); *Rowell*, 398 F.3d at 378 ("Texas capital juries make the eligibility decision at the guilt-innocence phase.... *Ring* is inapposite to any discussion of the constitutional requirements of the selection phase."). *Hurst* does not change the Fifth Circuit's jurisprudence.

Furthermore, Davila does not address *Kansas v. Carr*, in which this Court rejected the argument that the Eighth Amendment requires capital-

sentencing courts "'to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable double.'" 136 S. Ct. 633, 642 (2016) (citing *State v. Gleason*, 329 P.3d 1102, 1148 (2014)). The Court's reasoning in rejecting Carr's argument lends support to the Fifth Circuit's conclusion that this Court does not require a burden of proof for the mitigation special issue.

Addressing the question in *Carr* in the "abstract," this Court "doubt[ed] whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called 'selection phase' of a capital-sentencing proceeding)." 136 S. Ct. at 642. The Court explained that requiring a burden of proof for "the aggravating-factor determination (the so-called 'eligibility phase')" was possible because it was a purely factual determination—the facts either did or did not exist, and one could thus require proof of existence beyond a reasonable doubt. *Id.* But the existence of a mitigating factor is a "judgment call" and subject to the individual juror's discretion. *Id.* "And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy[.]" *Id.*

As noted, Texas capital juries make the death-eligibility determination at the guilt-innocence phase, and then determine whether the sentence should

be imposed at the sentencing phase-the "selection phase." *Turner*, 481 F.3d at 299-300; *see also Johnson v. Texas*, 509 U.S. 350, 362 (1993). The Texas special issues do not "increase[] the penalty for [capital murder] beyond the prescribed statutory maximum" in violation of the Constitution. *See Apprendi*, 530 U.S. at 490. And although a Texas capital-sentencing jury must specifically answer the mitigation special issue in the negative to render a death sentence, the actual function of that special issue inures to the defendant's benefit by allowing the jury an avenue to give effect to mitigating evidence. Thus, the mitigation special issue is a vehicle through which the jury is given the opportunity to make an individualized determination of the offender's moral culpability, as required by the Supreme Court. *Penry v. Johnson*, 532 U.S. 782, 797 (2001); *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982). In making the decision, the jury is instructed to consider all the evidence, including the circumstances of the offense, the defendant's character and background, and general moral culpability of the defendant. Tex. Code Crim. Proc. art. 37.071, § 2 (e) & (f). The jury is not required to agree on what evidence supports an affirmative answer. *Id.* The mitigation issue confers upon the jury a broad ability to show leniency and reduce the defendant's sentence to life imprisonment. Thus, *Carr*'s conclusion that the aggravating factor is a factual

determination versus the mitigating factor, which is a discretionary "judgment call" and "mostly a question of mercy," *see* 136 S. Ct. at 642, seems to agree with the Fifth Circuit in that an affirmative finding of aggravation is different than a finding of mitigation, which reduces the sentence from the statutory maximum. *See Granados*, 455 F.3d at 537.

Ultimately the *Carr* Court concluded that the existing case law did not require jury instruction that mitigating circumstances need not be proven beyond a reasonable doubt. *Id.* In support, the Court relied on *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998), in which the Court upheld a death sentence even though the trial court "failed to provide the jury with express guidance on the concept of mitigation," as well as *Weeks v. Angelone*, 528 U.S. 225, 232-33 (2000), in which the Court reaffirmed that it has "never held that the State must structure in a particular way the manner in which juries consider mitigating evidence" and rejected argument that it was unconstitutional to instruct jurors to "'consider a mitigating circumstance if you find there is evidence to support it," without additional guidance. The same logic extends to preclude any burden-of-proof instruction for the mitigation special issue.

The Court's doubt about whether it is even possible to apply a burden of proof to the mitigating-factor determination at the least confirms that the

Court has not addressed the burden-of-proof issue for mitigation. *See Carr*, 136 S. Ct. at 642. Davila thus fails to demonstrate that the denial of COA and rejection of his *Apprendi*-based habeas claim was contrary to any clearly established federal law existing at the time his conviction because final. Furthermore, the Court's recent decisions do not lend support to Davila's argument and, in fact, are contrary to his position.

CONCLUSION

The Court should deny Davila's petition for writ of certiorari.

Respectfully submitted,

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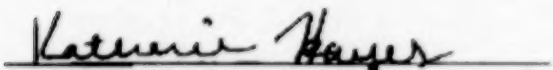

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No. 16-6219

IN THE
Supreme Court of the United States

ERICK DANIEL DAVILA,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PROOF OF SERVICE

I hereby certify that on November 23, 2016, a copy of Respondent's Brief in Opposition was emailed and sent by U.S. mail delivery to Petitioner's counsel Mr. Seth Kretzer, 440 Louisiana St., Suite 200, Houston, TX 77002, seth@kretzerfirm.com, and Mr. Jonathan Landers, 2817 West T.C. Jester Blvd., Houston, TX 77018, jonathan.landers@gmail.com. All parties required to be served have been served. I am a member of the Bar of this Court.

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November 23, 2016

VIA OVERNIGHT MAIL
Honorable Scott S. Harris, Clerk
United States Supreme Court
Office of the Clerk
1 First Street N.E.
Washington, D.C. 20543

Re: *Erick Daniel Davila v. Lorie Davis*
Cause No. 16-6219

Dear Honorable Harris:

Enclosed for filing is Respondent's Brief in Opposition, Proof of Service and ten copies. Please indicate the date of filing on the copy of this letter and return it to me in the postpaid envelope provided.

I'm forwarding a copy of the same Brief to the Petitioner's Counsel. Thank you for your kind assistance in this matter.

Sincerely,

Katherine Hayes /aeh

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CORD
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RIEFS

IN THE SUPREME COURT OF THE UNITED STATES

ERICK DANIEL DAVILA,
Petitioner,

-v-

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

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ARGUMENT

I. THE DIRECTOR'S RESPONSE IS WRITTEN IN THE PARADIGM OF THE REGIONAL COURT OF APPEALS, RATHER THAN THE SUPREME COURT

The Director states:

> Since Davila encourages the Court to extend *Martinez* to IAAC claims, by definition he cannot show that reasonable jurists would debate the correctness of the district court's procedural default determination based on ***this Court's*** then-existing precedent.

State's Br. at 13 (emphasis added).

> Davila cites to a Ninth Circuit opinion that has read *Martinez* as applying to IAAC claims, but the reasoning of that opinion has not been adopted by the ***Fifth Circuit.***

Id. (emphasis added).

Davila can only respond, 'agreed' and responds that these contentions suffer the logical fallacy of infinite regress. In other words, no petitioner could ever argue that this Court should grant cert on a Circuit-split, because by definition that case arose from a Circuit on the 'wrong side' (at least from the perspective of the petitioner) of the split.

The Director also confuses the role of a petition for certiorari, as contra-distinguished from a merits brief:

> Although Davila petitions this Court for review of the Fifth Circuit's denial of COA, he does not argue the purported ***merits*** of his underlying IAAC claim.

State's Br. at 9 (emphasis added).

Simply put, Davila's case is at the cert petition, rather than merits review, stage. "When the Court grants certiorari—which is as common as winning the lottery—the parties file briefs on the ***merits*** of the case and, typically, the Court will hear oral argument and then issue a decision in the case." Elizabeth Slattery, *Supreme Court 101: A Primer for Non-Lawyers* (available at: http://www.heritage.org/research/reports/2014/04/supreme-court-101-a-primer-for-non-lawyers).

II. THE DIRECTOR'S 'WAIVER' ARGUMENTS ARE INAPPOSITE

The Director is incorrect in her assertion that "he does not argue the purported merits of his underlying IAAC claim." State's Br. at 9. As best as Davila can tell, the Director means to argue that his arguments about *Martinez/Trevino* extending to excuse procedural default on the part of state direct appellate counsel are pretermitted by an absence of any underlying error for that appellate attorney to have argued against. At the same time, the Director appears to raise a related argument that

Davila has inadequately briefed his argument for review in this Court. State's Br. at 9-10 (citing a passel of Fifth Circuit cases on waiver, none of which have to do with the quantum of argument required to raise a claim for cert petition in the Supreme Court).

The Director's two interrelated arguments fail, in no small part because Davila raised this issue extensively through such arguments as: "The jury seized on the 'single intent' argument, but was given an improper jury charge virtually ensuring a capital murder conviction." Davila's Br. at 9; "The judge responded with a misleading instruction, which did not clarify that Davila must have intended to kill two distinct people before he could be convicted of capital murder." Davila's Br. at 10; "The defense objected to giving the jury this charge, but the objection was overruled." *Id.*; "Davila's direct appellate counsel failed to raise this incorrect jury charge argument on direct appeal."; *Id.*; "Had Davila's appellate counsel raised the charge error claim on direct appeal his conviction would have been reversed." *Id.*

III. The Director's Argument Concerning Davila's Purported Forfeiture of the Jury-Charge Argument Suffers a Misunderstanding of the Standard of Review of These Claims Under Texas Law

The Director is mistaken in its contention:

> [T]he allegedly erroneous jury instruction that serves as the basis for Davila's claim of appellate-counsel ineffectiveness was not properly preserved for review with a trial objection.

State's Br. at 14.

However, Texas law does not completely bar review of a jury instructional error if a trial objection is not made:

> Under *Almanza*, the degree of harm required for reversal depends on whether the error was preserved in the trial court. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005); *Almanza*, 686 S.W.2d at 171. Where, as here, the defendant did not raise a timely objection to the jury instructions, reversal is required only if the error was fundamental in the sense that it was so egregious and created such harm that the defendant was deprived of a fair and impartial trial.

Villarreal v. State, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015).

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE TEXAS COURT OF CRIMINAL APPEALS AND THE FIFTH CIRCUIT HAVE BOTH HELD, REPEATEDLY, THAT NO BURDEN OF PROOF IS REQUIRED ON TEXAS' MITIGATION SPECIAL ISSUE IN SPITE OF THE FACT THAT A SPECIFIC FINDING ON THAT SPECIAL ISSUE IS A PREREQUISITE TO A SENTENCE OF DEATH. THESE DUAL HOLDINGS CONFLICT WITH THIS COURT'S DECISION IN *APPRENDI*, *RING*, AND *HURST*.

Kansas v. Carr, 136 S. Ct. 633 (2016) does not support the contention that no burden of proof is required when "a Texas capital-

sentencing jury must specifically answer the mitigation special issue in the negative to render a death sentence,". *See* Davis Br. at 27-30.

Davila challenges Texas' sentencing scheme under the Due Process Clause of the Fifth and Fourteenth Amendments, and the Sixth Amendment's notice and trial guarantees. *Carr* involved a completely separate issue: whether the "the Eighth Amendment requires capital-sentencing courts in Kansas 'to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt.'" *Carr*, 136 S. Ct. at 642. Not only are the constitutional bases of these two claims different, but Davila is not asking for an instruction relating to the existence of individual mitigation factors. He is asking that the jury be required to make all findings necessary for a death sentence beyond a reasonable doubt.

Nor is this Court's concern in *Carr*, related to assigning a burden of proof to mitigation evidence, relevant to Texas' capital sentencing scheme. *Carr*, 136 S. Ct. at 642. In *Carr*, this Court recognized that it was possible to assign a burden of proof to the aggravating factors in Kansas' capital scheme because they were "a purely factual determination." *Id.* However, whether or not mitigation exists is "largely

a judgment call" which would, according to the Court, not lend itself to a burden of proof.

However, Texas' first statutory special issue (also a necessary ingredient for a sentence of death) asks the jury to make a judgment call, and it successfully employs a burden of proof: "Do you find beyond a reasonable doubt that there is a probability that the defendant, Erick Davila, would commit criminal acts of violence that would constitute a continuing threat to society?" TEX. C. CRIM. P. ART. 37.071(e)(1). This question, clearly a judgment call, lends itself nicely to the beyond a reasonable doubt standard required by *Ring, Apprendi,* and *Hurst.*

Texas could just as easily require a burden of proof on the second special by instructing the jury as follows: "Do you find **[beyond a reasonable doubt]**, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Erick Davila, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentenced be imposed?" Art. 37.071(e)(1) **(suggested language in bold)**.

Indeed, Davila is merely asking for a jury instruction similar to the one given in *Carr* which made "clear that both the existence of aggravating circumstances and the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt." *Carr*, 136 S. Ct. at 643. The defect in Texas' capital sentencing scheme is that the jury is not required to conclude that the mitigating evidence does not outweigh the aggravating evidence beyond a reasonable doubt. *Carr* does not affect the analysis of this claim.

Further, this claim is not *Teague* barred. The non-retroactivity doctrine established in *Teague v. Lane*, 489 U.S. 288 (1989) prohibits the retroactive application of new constitutional rules of criminal procedure on collateral review. Under *Teague*, a new rule is one which either breaks new ground, imposes a new obligation on the states or the federal government, or was not dictated by precedent existing at the time the defendant's conviction became final. *See Graham v. Collins*, 506 U.S. 461, 467, (1993).[1] "Under this functional view of what constitutes a new rule,

[1] There are two exceptions to the non-retroactivity principle announced in *Teague:* (1) where the new rule of criminal procedure places certain kinds of conduct beyond the power of the government to proscribe; or (2) if the rule requires the observance of procedures that are implicit in the concept of ordered liberty. *Teague*, 489 U.S. at 307 (citations omitted).

our task is to determine whether a state court considering [Davila's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [Davila] seeks was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990).

Davila's case became final when this Court denied certiorari of his direct appeal on January 26, 2011. *Davila v. State*, No. AP-76,105, 2011 Tex. Crim. App. Unpub. LEXIS 43 (Tex. Crim. App. 2011).

At that time both *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) had been decided. Davila's argument involves mere interpretation and application of well-settled concepts *as supported* by *Hurst*. Accordingly, the anti-retroactivity principles of *Teague* have not been violated.

CONCLUSION

This Court should grant the petition and order merits review.

Respectfully submitted this 7th day of December 2016.

By: _____
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CERTIFICATE OF MAILING

I hereby certify that, on the 5th day of December 2016, this pleading was served on the Court via mail courier.

Seth Kretzer

CERTIFICATE OF SERVICE

I hereby certify that, on the 5th day of December 2016, a true and correct copy of this petition and appendices was sent to AAG Katherine Hayes in the Office of the Texas Attorney General.

Seth Kretzer

RECORD AND BRIEFS

No. 16-6219

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In The
Supreme Court of the United States

ERICK DANIEL DAVILA,

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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U.S. District Court
Northern District of Texas (Fort Worth)
CIVIL DOCKET FOR CASE #: 4:13-cv-00506-O

Davila vs. Stephens, Director TDCJ-CID
Assigned to: Judge Reed C O'Connor
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

05/19/2014	17	AMENDED PETITION for Writ of Habeas Corpus filed by Erick Daniel Davila. In each Notice of Electronic Filing, the judge assignment is indicated, and a link to the *Judges Copy Requirements* is provided. The court reminds the filer that any required copy of this and future documents must be delivered to the judge, in the manner prescribed, within three business days of filing. (Filer fee note- IFP granted or CJA appt..) Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas should seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: *Attorney Information – Bar Membership.* (Attachments: # 1 Exhibit(s)) (Kretzer, Seth) Modified on 9/5/2014 (ali). (Entered: 05/19/2014)
04/21/2015	38	Memorandum Opinion and Order Court denies Davila's petition for a writ of habeas corpus. Court denies Davila a certificate of appealability

		because he has failed to make a substantial showing of the denial of a constitutional right. If Davila files a notice of appeal, he may proceed informa pauperis on appeal. (Ordered by Judge Reed C O'Connor on 4/21/2015) (ult) (Entered: 04/21/2015)
04/21/2015	39	FINAL JUDGMENT Ordered, Adjudged, and Decreed that the claims in the petition are dismissed with prejudice. All relief not expressly granted is denied. (Ordered by Judge Reed C O'Connor on 4/21/2015) (ult) (Entered: 04/21/2015)

General Docket
United States Court of Appeals for the 5th Circuit

Court of Appeals Docket #: 15-70013

ERICK DANIEL DAVILA

Petitioner-Appellant

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION
Terminated: 05/05/2016

Respondent-Appellee

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

05/07/2015	ELECTRONIC RECORD ON APPEAL FILED. Exhibits on File in District Court? No. State Court Papers included? Yes. Electronic ROA deadline satisfied. [15-70013] (MFY)
05/31/2016	REVISED UNPUBLISHED OPINION FILED. [8213460-2] [15-70013] (JMA)
06/28/2016	COURT ORDER denying petition for rehearing en banc filed by Appellant Mr. Erick Daniel Davila [8227573-2] Without Poll. [15-70013] (MRW)
01/17/2017	SUPREME COURT ORDER received granting petition for writ of certiorari filed by Appellant Mr. Erick Daniel Davila

in 15-70013 on 01/13/2017. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. [8402916-1] [15-70013] (LGL)

REPORTER'S RECORD

VOLUME 14 of 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
VS.	
ERICK DANIEL DAVILA	COURT NUMBER ONE
	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 10th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

CASHMONAE STEVENSON,

[18] having being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS BURKS:

Q. Good morning.

A. Good morning.

Q. Can you turn to the jury and tell them your name.

A. Hello. My name is Cashmonae Stevenson.

* * *

Can you tell the jurors how of old you are, Cashmonae?

A. Eleven years old.

* * *

[19] Q. Now, let me ask you about something that happened around Nahtica's birthday. Do you remember that?

A. Yes.

[20] Q. Do you remember the day, Sunday, April 6th, 2008?

A. Yes.

Q. What did you do that day?

A. Went to church and had a birthday party for my sister.

Q. Let me ask you first about the birthday party for your sister. Is that for your sister, Nahtica?

A. Yes.

* * *

Q. Did you do anything to prepare for the birthday party?

A. Went to go get party favors.

Q. And what kind of party favors did you get?

A. Crowns, silly spray, candy bags and cake.

Q. And what kind of cake did you get?

A. Hannah Montana cake.

Q. Now, all of the people that lived in your house at 5701 Anderson, were they there at the party?

A. Yes.

Q. Were there other people at the party?

[21] A. Yes.

Q. Who else was at the party?

A. My cousin and her family; Brianna Scott; my Aunt Sheila – I mean, my cousin, Sheila. My Uncle Jerry. And kids, other kids.

Q. And when you say other kids, how many kids would you say were at the party?

A. Sixteen.

Q. Okay. Now, during the party, what did you-all do?

A. We rode bikes, played and went to the park.

Q. Okay. And at some point did you come back from the – from the park?

A. Yes.

Q. And what did you-all do after that?

A. Played with the silly spray.

* * *

Q. Did anyone eat the Hannah Montana cake?

A. Yes.

Q. Okay, Tell the jury about that. When did you-all eat the cake?

A. Around the time when the shooting happened.

* * *

[22] Where were people eating cake?

A. On the porch.

Q. In the front yard of 5701 Anderson?

A. Yes.

Q. And how many people were eating cake and out in the front yard?

A. The kids and the adults.

Q. And can you tell the jurors which adults were outside at this time?

A. Brianna's family, me, my sister, my two brothers, my granny, my auntie, and my cousin Sheila.

Q. And was your Uncle Jerry outside?

A. Yes.

Q. Tell the jurors what happened while you were all outside eating cake and ice cream.

A. I saw this black car come from the left – from the right side of my house, and then it went down the street. Then it went around the corner Then it came back from down the street. He went into the entrance right there and went around the dumpster, then came back and parked on the side of the house in front of us.

Q. All right. Did you notice anything about the black car when it passed by?

A. Yes, it had a gun with a red dot on there.

* * *

[23] Q. What did you think when you saw that?

A. I thought something – I thought to myself, I thought something was going to happen, but I didn't tell nobody because my – 'cause my family, that –I was scared they was probably gone say, Be quiet, Monae, you don't know what you talking about."

Q. Okay. After you saw the car with the gun and the red dot can you tell the jurors what you saw next – saw and heard next?

A. I saw this man – this man running across the field and stood next to the house that was in front of us and started shooting. And the red dot that was on the gun pointed towards the house – pointing towards our house.

Q. Okay. Do you remember how many times the man with the gun with the red dot shot at you-all?

A. No.

Q. Was it more than one?

A. Yes.

Q. Once – what were you-all doing once you – what did you-all do once you heard the man – saw the man shooting the gun?

A. We –we – stacked on top of each other when we went – when we went in the door.

[24] Q. Okay. So did you-all run to the house?

A. Yes.

Q. Okay. And when you say you were stacked on each other, what do you mean by that?

A. I was at the bottom, and other people was on top of me.

Q. Did you have a cousin names Queshawn?

A. Yes.

Q. Was she outside and at the party?

A. Yes.

Q. Do you remember what she was doing right before the shots were fired?

A. Eating her ice cream and cake.

Q. And where was she in – in front of the house?

A. By the bikes.

Q. Do you know if she was sitting on the porch or do you know where – what she was sitting on?

A. She was sitting on the porch.

Q. By the bikes?

A. Yes.

Q. Now, you said that everyone went, and they were stacked on top of each other. Tell the jury what you remember happening next.

A. My mama pulling my –my mama pulling my arm and then putting me on the couch. And I said, "Ow.

[25] And she said, "My baby, my baby."

And then she went in my granny [sic] room and said, "My mama, my mama."

* * *

Q. Okay. When she pulled you out from underneath everyone, where – where did she go – where did you go?

A. On the couch.

* * *

[26] Q. And while you were on the couch, did you feel anything on your body?

A. Yes.

* * *

A. I felt this sting in my arm and this burn.

Q. Okay. Can you point to where you felt the sting in your arm for me?

A. (Witness complied.)

Q. And you're pointing to your right elbow?

A. Uh-huh, yes.

* * *

Q. What was everyone doing in the house when you were being pulled from underneath the stack?

A. Screaming and trying to get to safe places.

Q. Did your mother ever move you from the sofa?

A. Yes.

Q. And why did she move you from the sofa?

A. So my Uncle Jerry can put Queshawn Stevenson on the couch.

Q. And where did your Uncle Jerry get Queshawn from?

[27] A. Outside.

Q. When he brought her in, do you remember what she looked like?

A. Yes.

Q. Can you tell the jury?

A. She lookeded [sic] dizzy.

* * *

[28] Q. What happened after that?

A. The ambulance came. And as soon as I was fixin' to pick my elbow up, I saw that – that I was – been shot twice in my left hand.

Q. And was your left hand hurting?

A. No.

Q. Did you see any – when you say you saw that you were shot in your left hand, what made you think you were shot?

A. I had holes in my hand and blood on my fingers.

* * *

Q. Were there other people in the house that were hurt?

A. Yes.

Q. Who else was hurt?

A. Sheila, Nahtica.

Q. Let me ask you real quick. Is Sheila a grown-up, or is she a little kid?

A. A grown-up.

Q. So Sheila and Nahtica, and who else?

A. Brianna.

Q. And is Brianna a little kid, or is she a grown-up?

A. A little kid.

[29] Q. And who else was hurt?

A. Me, Queshawn and Annette.

Q. Your granny?

A. Yes.

Q. Did you see your granny?

A. Yes.

Q. Where was she?

A. In her room on the floor.

* * *

[31] Q. After that day, Cashmonae, did you see your cousin, Queshawn, again?

A. No.

Q. Did you see your granny, Annette, again?

A. No

* * *

[136] Q. So you – from where you were you could see that kids were outside playing?

A. Yes, ma'am.

Q. All right. Now, you said that the guy that got out of the car with the gun was up against the house across the street, is that right?

A. Yes, ma'am.

Q. And tell the jury what you saw him do.

A. He fired the gun, then ran to the other end of the building, stood in the street, and fired it and then hopped in the car.

* * *

[137] Q. Okay. When you notice that there were a bunch of people outside of the house, did you see whether or not there was a – an adult male outside?

A. Yes.

Q. Did you know that person?

A. Yes.

Q. And who was that person?

A. Dooney.

Q. Dooney. Do you know Dooney's real name?

A. No.

Q. Was he related to Ms. Stevenson?

A. Yes.

Q. How was he related to Ms. Stevenson?

A. Her son.

Q. Was he the only adult male that you saw outside the house?

A. Yes, ma'am.

Q. The rest of them were women and children?

A. Huh?

Q. The rest were women and children?

A. Yes ma'am.

* * *

[138] Q. How many shots did he fire from the corner of the house?

A. About nine.

Q. Okay. And what were the – the women and children doing when – when the shots were being fired?

A. The granny, she started pushing the kids in the house told them to get in the house. And the little girl got shot in the stomach. She was laying on the ground outside.

* * *

[139] Q. Okay. Now you said the granny started pushing the kids in the house. What happened next?

A. She got shot a couple of times.

Q. Who is she?

A. The granny.

Q. You saw her get shot?

A. Yeah.

* * *

[140] Q. After – and you said he fired about how many shots there at the corner?

A. About nine.

Q. And then what did he do?

A. Ran to the other side of the building and shot, and then hopped in the car and drove off.

* * *

[145] Q. And let me just ask you, can you describe the response that the guy with the gun had when Big Boy moved out of his line of vision?

A. He seemed like he was mad 'cause he had missed the chance to get him.

Q. And did he do anything with the weapon in response to his attempt, his missed attempt?

A. Huh-uh but picked it back up and fired.

Q. Okay. So he put the weapon down?

A. (Moves head up and down.)

Q. Is that "yes"?

A. Yes, ma'am.

Q. Did he appear frustrated to you?

A. Yes, ma'am.

Q. When he picked the weapon back up to fire who was left on the porch of the house?

A. Nobody but the girl that was laying outside.

Q. No, I mean before the shots were fired. When he picked the gun back up to fire it tell the jurors who was out on the porch.

A. The granny and some of the kids.

Q. Women and children?

[146] A. Yes.

* * *

[211] SHAWN GREENE,

having been duly sworn, testified as follows:

* * *

[214] Q. And what was it about the condition of the house that led you to believe there was a birthday party going on?

A. There was banners. You could see birthday hats. [215] There was cake, presents, things like that.

* * *

[216] Q. Okay. And where within the house were you able to locate injured people?

A. Immediately in the front door in the living room and kitchen area was pretty much everybody that had been injured. In the back bedroom there was one deceased female that we had located, and nothing else throughout the house.

Q. Other than the deceased female that you located, were there any other injured adults?

A. From what can recall, I believe there was one other injured adult that looked like she had been injured in the leg.

Q. And were the rest of the injured persons all children?

A. Yes.

Q. And approximate – approximately how many children do you recall having been injured?

* * *

A. From what I could see there was three.

* * *

[239] ARLETTE KEYS

having been previously sworn, testified as follows:

* * *

[249] Q. And – and would you describe that little girl to us that was –that you noticed inside the house.

A. Excuse me. Is that really necessary? Do I have to?

Q. Just – just very generally. Was she hurt?

A. Badly, uh huh.

Q. And what –what part of her was hurt?

A. Her abdomen and her shoulder.

Q. And how did you know if she was hurt?

A. It was blood everywhere. The towels were being soaked in a matter of seconds.

* * *

REPORTER'S RECORD

VOLUME 15 OF 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
VS.	COURT NUMBER ONE
ERICK DANIEL DAVILA	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 11th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[37] JERRY STEVENSON,

having being first duly sworn, testified as follows:

* * *

[43] Q. * * * How old was Queshawn when she died?

A. Five.

Q. And your mother, Annette, State's Exhibit 80, how old was she when she passed away?

A. Forty-seven.

Q. And let's talk a little bit about the day they died. Where did this happen?

A. 5701 Anderson.

Q. And why were you-all there that day?

A. A birthday party.

Q. Whose birthday party?

A. My niece, Nahtica.

Q. How many people were present at the birthday party?

A. I would say from anywhere from – I'd say about at least 17 people, 16, 17 people, including kids.

[44] Q. Of the 16 or 17 people that were there, how many were adults?

A. Sheila, my mother, my sister, me and my other sister. Five.

Q. And can you – you kind of went through them, but can you tell the jurors what adults were present?

A. My – my two sisters; my cousin, Sheila; and my mother and me.

Q. Were there any other males, your – like your brother, Jeremy, were there any –

A. No, ma'am.

Q. No other male adults?

A. No, ma'am. I was the only male.

* * *

Q. About what time did the party begin?

A. I'd say 6:00-something, I believe.

Q. And tell us what you-all did. What was going on at the party?

A. Everybody was having a good time, having a birthday party. Doing what they do at a birthday party, especially the kids.

Q. And what were the kids doing?

A. Having fun, riding their bike, running around, [45] enjoying they self.

Q. Now, at some point did something change?

A. Yes, ma'am.

Q. Tell the jury about that. What happened?

A. I'd say it was probably, like, an hour after we left – an hour, hour and a half after we left the party. I think, like, the party begin at six o'clock, like 6:00-something. I'm not sure what time.

I say my girlfriend got off at eight o'clock, but the party was still going on. So I phoned her and let her know that we was going to be late because the party was still going on.

But everybody was outside just having a good time. I was telling my kids to finish up doing what they

– what – eating they cake and ice cream. And I say around about 8:00 – I believe 8:20, I looked at my watch 'cause I was telling the kids, "We gotta go. We late 'cause mama got off at 8:00."

So I say about 8:20 – about 8:21 or 22, I seen a black car approach over the speed humps and turn the corner by my mama's house. I didn't think nothing of it, but I seen a red beam. Just like a beam, but I noticed it was a gun.

* * *

[54] Q. * * *

Where did you see the individual with the rifle?

A. At the corner of the house right here across from my mother's house. * * *

* * *

Q. When you saw – when you saw that and heard the shots, what did you do?

A. I turned and looked to see where it was coming from, and it was coming from behind – behind me.

Q. And then what did you do?

A. Me – well, every – well, me and my – like, I had my son hand at the time, and me and my son and everyone else tried to enter the house.

Q. Were you-all successful in entering the house?

A. We was – everybody was piled on top of one another and just crazy.

Q. Do you remember where your mother was?

A. At the time –

Q. At the time of the shots.

[55] A. Okay. At the time of the shots, I remember my mother, like, telling me – putting her hands up, like, getting all the kids and trying to get everybody in the house. And everybody made it in the door. And I seen my mother just, you know, like, walking – I think she was in – by the couch, I'm not sure. I know she was by the front door or whatever, but I think she was moving towards her room.

* * *

Q. And where was your daughter, Queshawn?

A. At the time, I – I – she was not in the house.

Q. Did that concern you?

A. Yes, ma'am.

Q. What did you do?

A. At the time that we went in the house and I pushed my son in the corner, I left him at the corner and [56] was hollering for Queshawn's name, "Queshawn, Queshawn." And I was going through, like, to my mother's room and hollering, "Queshawn, Queshawn." But she didn't answer. I went to the door, and she got shot.

* * *

[57] A. After I called Queshawn name out, didn't hear her respond, I immediately went to the door.

* * *

[60] Q. When you saw Queshawn outside, what did you do?

A. I immediately picked her up. Went over there and picked her up.

Q. And what did you do with her?

A. I carried her in the house and laid her on the couch.

Q. Can you describe for the jury what condition she was in?

A. Excuse me. I just thought she was shot one time. When I picked her up, she had her hand on her – on her stomach. And I picked her up, and I took her in the house, and I laid her on the couch. And I was asking for towels, and I raised her shirt up, and her guts was hanging out, so I proceeded to put towels on that. And [61] then she happened to turn her head, and I seen her neck, and I just lost it. I just went crazy.

* * *

Q. * * * What was the – tell us what was going on in the house at this time.

A. A lot of commotion. Crying kids screaming, "I'm bleeding, I'm bleeding." I mean, that's all you

heard was kids yelling, "I'm bleeding." That's all you heard. Crying, screaming.

* * *

[63] Q. Was Queshawn saying anything or doing anything?

A. Yes, she was.

Q. What was she saying to you?

A. She was rubbing my face and breathing and saying she wanted her mother.

* * *

[65] Q. Now, did you at any point go into your mother's bedroom?

A. Yes, at a point I did.

Q. At what point did you do that?

A. At the point where I think the police had came, and they had her door closed. And I opened the door and I went in, and I asked them was my mama okay.

Q. You asked them?

A. Was my mother okay.

Q. Did you see your mother?

A. Yes, I did.

Q. And where was she?

A. Laying on the floor.

Q. Was your mother saying anything?

A. No, she wasn't.

* * *

[66] Q. And when it was all said and done, how many people had been injured in the house? Or just tell us who had been injured.

[67] A. Nahtica, Cashmonae, Queshawn, Annette, Sheila, Brianna, I believe.

Q. And how old is Brianna?

A. I'm not sure.

Q. Is she a young girl?

A. Yes, ma'am.

Q. Did you see her injuries?

A. Like, I think two of the bullets grazed the top of her head and cut her braids.

Q. Actually cut her braids off?

* * *

Q. Okay. Tell us about Queshawn, where did she go?

* * *

A. * * * the police * * * told me they had to Care-Flite Queshawn to Cook's. So they brought Queshawn

outside. I was walking with her to the ambulance, and they took off.

* * *

[68] Q. And did she expire in the hospital?

A. Yes, ma'am.

* * *

[126] J.J. JEANES,

having been previously sworn, testified as follows:

* * *

[222] Q. * * *

So am I correct in – in – in determining that there was approximately one, two, three, four, five, six bullet holes on the outside with a couple question marks on two of them?

A. Yes.

* * *

[251] SHEILA MOBLIN,

having been previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GILL:

Q. Tell the jury your name, please.

A. Sheila Moblin.

Q. And Ms. Moblin, how old a woman are you?

A. Thirty-six.

* * *

[253] Q. And approximately how many people were at the birthday party at that time?

A. It was about – about 15 or more children, and – and it was – well, me and Jerry and Annette and Tamesha and Talisha, which was the adults that was there, about five adults.

Q. So Jerry was the only adult male there?

A. Yes.

* * *

[254] A. It was, like, a little bench, a white bench that was there, and I was sitting on it.

Q. And who else was around you at that time?

A. Well, it was the childrens that was sitting, like, in front of me on the porch. And Jerry was standing, like, to the left of me; and Annette was, like, on the right.

Q. And what were the kids doing out on the front porch at that time?

A. Eating cake and ice cream.

Q. And when you realized there were shots being fired, what did you do?

A. I got up, and I started running in towards the house. And like, a couple of childrens that was in front

of me, and I kind of like – all three of us ran, like, off into the restroom, in the back restroom.

Q. So it would be a fair statement when the shooting started, pretty much everybody started running in that house?

A. Yes.

* * *

REPORTER'S RECORD

VOLUME 17 of 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
VS.	COURT NUMBER ONE
ERICK DANIEL DAVILA	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 13th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[49] TOBY REED,

having been previously duly sworn, testified as follows:

* * *

[56] A. The defendant, he sped out of the parking lot and went northbound . . . excuse me, I've just got to figure out the name of the street.

* * *

Q. About how fast is the defendant traveling at this point?

A. I would say in excess of 50, 60 miles an hour.

Q. And is this a residential area?

A. Yes, ma'am.

Q. What happens next?

A. Once he was traveling northbound on Oakland Hills, he then made a left-hand turn, failed to stop at the stop sign, I mean, clearly blew a stop sign going westbound onto Boca Raton. We tried to keep up with him, [57] maintain the visual of him. He traveled a few blocks and then made a north – another northbound turn onto – it's the country – Country Club Drive.

Q. Does Country Club Drive dead-end into an apartment complex?

A. Yes, ma'am.

Q. Okay. And what happened once – did you-all arrive at that apartment complex?

A. Yes, ma'am, we did.

Q. Can you tell the jurors what happened when you got there?

A. He proceeded at a high rate of speed into the complex, went to the northwestern end of the complex. He struck two vehicles that were parked, and then doubled back and went back southbound through the complex, which kind of scattered our team throughout. So the direction we were traveling him with the SWAT officers and us and then the – my other partner that's the agent, we all switched roles, and I think Agent Martinez was the lead vehicle, the SWAT officers

became the second vehicle, and me and my partner became the third vehicle.

* * *

[58] Q. Tell the jurors what happened next.

A. Once the vehicle – once Mr. Davila struck the vehicles, he then proceeded back southbound throughout the complex, Once he exited or started exiting the complex, he actually jumped out of his vehicle while it was still in motion and took off running.

Q. What did you do in response to him running?

A. When we had a direction of travel that he was actually running, Agent Martinez called out that he had a gun. So me and my partner tried to intercept him. He was running northbound, so we tried to intercept him through two buildings that were northbound in his position.

Q. When you tried to intercept him between the two buildings, did you see anything? Did you see anything that he was doing?

[59] A. Yes, ma'am. We ran between two buildings. And at about that time he came around the corner trying to jump into the patio balcony of a first floor apartment right there.

Q. And did he actually jump into that back patio area?

A. He observed me and my partner running at him, so he doubled back and took off running eastbound through the complex.

* * *

Q. Did you at some point apprehend him?

A. Yes, ma'am.

* * *

[152] BRENT JOHNSON,

having been previously sworn, testified as follows:

* * *

[161] Q. And did the medical investigators arrive?

A. They did.

Q. And once they came in contact with the body of Annette Stevenson, did you notice any injuries on her?

A. I did.

Q. Can you describe those for the jury.

A. She had bullet – or what appeared to be bullet holes in her – one in her breast, and she had some on her hip.

* * *

[204] Q. (BY MS. BURKS) Okay. Detective Boetcher, I'm going to have you read – Detective Johnson, I'm going to have you read again, if you – do you see State's Exhibit 166 here on the ELMO?

A. Yes, ma'am.

Q. And where does the statement actually begin? What's the first word?

A. "My name is Erick Davila."

Q. Can we start – and is that information in that paragraph the same, I guess, biographical information that he gave us before?

[205] A. Yes, ma'am.

Q. And can we start with this paragraph, and if you would read that – read this statement to the jury.

A. Excuse me, "Back in the first part of 2005, one of the Crip members tried to run my mother off the road while she was pregnant. The person who tried to run my mom off the road used to live right by us. I think it was intentional that they tried to run her off the road. I know it was intentional because she tried to get away from him, and she got away from them. They also tried to talk to my sister, but she rejected him and he got mad and made comments about your rejecting me about woo-woo-woo, which meant that I was a Blood and he was a Crip." Keep reading?

Q. Yes.

A. "Sometime in the end of 2005, I was walking down the street, and I was shot by some of the members of Polywood, and they were in a gray Nova and now it's gold. I got shot in the arm and grazed in the head. I know that it is stuff dealing with the same family that lives in the third gate of the apartments.

I met Nichcole and we started dating, and she is pregnant with my baby now They have been mugging my car, looking at me. It's like they wanted to get me, so on Sunday I was in my car and I was driving and [206] Garfield was in the car with me. As we passed by, they jumped off the porch and into the street, and Garfield seen them and said, this don't look good, like they were going to do something. When I seen them walk to the car, they popped the trunk and I was driving down the street. I put the window down so they could see me. I rolled to the back of the apartments, and for him to drive. I told him, they ain't fixing to do this – they ain't fixing to do me like this, cause this is my hood. I told Garfield that I was going to do what I do, and we can have a shoot 'em up. I told him I was going to drive to the back and to let me out of the car and for him to leave. I had the AK with me, but I didn't have a clip, so I had to go to Ms. Sheila's to get the clip.

We went around to the back of the apartments, and the AK has a scope and a red beam on it. I went up to Ms. Sheila's door carrying the AK. A little boy answered the door, and I went in and got the clip that was right under the sofa. I got the clip and put it in the AK. When I went back outside, I went through the field where the shooting happened. Ms. Sheila's house is

kind of a trap, that is, where everybody goes to keep their guns and their weed.

Garfield had the AK in the front seat with him as we passed by in the front seat. Once we got [207] around to the back, I got out with the AK. When I told Garfield it was my hood and we were going to have a shoot 'em up and I was going to scare them and let them know that I had a gun, I told Garfield to drive around to the front.

Garfield made the mistake and went down Anderson, the wrong street. By then I had walked through the back of the apartments, through the middle of the field, to the field across the street. I had a scope on my gun, so I had range. I stood in the field across the street. The fat dude was in the middle of the street. The other three were on the porch. I wasn't going to give them a chance to get a gun.

Garfield had stopped my car in the middle of Anderson, and I thought they were going to start shoot up my car. I only let off 10 rounds, and I had 21 in the clip. I was trying to get the guys on the porch, and I was trying to get the fat dude. I wasn't aiming at the kids or the woman and don't know where the woman came from. I don't know the fat dude's name, but I know what he looks like, so I recognized his face. I ran up to my car and I was pissed because he was stopped there, and I asked him what he was doing. He was supposed to go down to Briery and on to Fitzhugh, but he went down the wrong street.

[208] I got in the car on the passenger's side. I let him drive and I went back to Copper Creek, 1213, to my apartment. I dropped Garfield off at his house. He represents Norris Street. I took the gun upstairs in the apartment and went to sleep. I kept the gun with me all day Sunday, and I always kept it with me because I thought they would get me. I kept the gun in a duffel bag in the closet, and I took it with me every time I left.

The pistol belongs to Garfield, and he had it with him in the car and left it there when he left. I did all the shooting and not Garfield. As far as where the AK is, Terminal has it and must have took it from the apartment when I was arrested.

* * *

REPORTER'S RECORD

VOLUME 18 of 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL
VS.	DISTRICT
ERICK DANIEL DAVILA	COURT NUMBER ONE
	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 17th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[140] Q. (BY MR. GILL) * * * Let me direct your attention back here to State's Exhibit 161. Right here behind you' And ask if you recognize the contents of State's 161?

* * *

I recognize State's Exhibit 163 as a Norinco 7.62x39mm SKS S model rifle, semiautomatic rifle, that I examined in my laboratory.

* * *

[142] A. This is a Norinco, which is a China manufacturer. It's an SKS S, which is basically an SKS

model which is a precessor to the – it' s a Russian-type military weapon. It has a folding stock, which is why it is also – has the other S on the model, SKS S. The SKS S refers to the folding stock here, which it folds out of the way for – make it more compact.

It' s a bolt-action rifle, has a bolt. Semiautomatic,

* * *

[148] Q. Is there a bayonet on the front of that weapon?

A. Yes, sir, there is.

* * *

Q. Does the weapon have any sights, something that someone would use to sight the weapon?

A. Yes, sir. This weapon actually has [149] three different sights, sighting systems on it. Typically it will only come with one.

Q. What are the three sighting systems?

A. You have the adjustable sight, which is right here. And you will set it up. This moves up and down where you can adjust it for windage, for distance and such. You would – you know, based on if you're shooting how many – how many feet, yards or whatever, you would adjust it to that. And you would actually sight right through here. Which at this point because of this telescopic sight, this really is not of any use currently.

It also has a telescopic sight, which is here, which you adjust for distance, height, windage, side to side.

This is something where you would go out to a range, and you would actually sight the gun in – the – the sight in at certain distances. Say you have a target and you wanna bulls eye the target, then you're going to adjust this – you're going to shoot, see where you hit the target, and then adjust this to where you – you do hit the target. This is also telescopic because it magnifies your target. Okay?

The third – the third area – the third one is what's called a laser sight, which is right here. You can see on the wall here you have a red dot. Okay? [150] The red dot is, it helps you sight –it basically helps you target what you' re shooting at.

* * *

[163] A hollow point is a – is a bullet that has a cavity in the nose of it so that the – and the purpose of the hollow point is generally – it's twofold. When it strikes some, say, soft tissue or – or a target that's soft, then that allows that – then that material is going to go inside the bullet, inside the hole, the cavity, and it's going to – it's going to expand the nose of it.

So it's going to allow that bullet to mushroom, which is twofold: One is to re – reduce the amount of penetration of that bullet, so hopefully it won't go on through the target onto something that you didn't want to shoot. And the other purpose is also to disrupt more tissue of what – because the bullet, instead of, say, instead of this diameter, may be this diameter by the time it mushrooms, so it's actually going to cause a little bit more damage to whatever it strikes.

Q. Now, you had submitted eight Wolf and two Brown [164] Bear that came with the rifle; is that correct?

* * *

A. The Brown Bears were both jacketed hollow point. And the Wolfs, we had a combination of full metal jackets and jacket hollow points. Five of the Wolf were jacketed hollow points, and three were full metal jackets.

* * *

[263] GARY L. SISLER, M.D.,

having been first duly sworn, testified as follows:

* * *

[267] Q. (BY MS. BURKS) Dr. Sisler, can you go through and describe injuries or abnormalities that you observed on Annette Stevenson.

A. Yes, ma'am.

Q. How many injuries did you observe on her?

A. Actually, three.

Q. Can you describe those three injuries for the jury.

A. Yes, ma'am. There was an entry gunshot wound over the left back, and it exited over the left chest area. And then there were what we call fragment injuries over the left side of the left thigh. And when I

say fragment injuries, the projectile hit something and then – and then fragmented.

Q. Now, the wound that you observed to her back, [268] would you consider that to, be an entry wound or an exit wound?

A. I classified that as an entry gunshot wound.

Q. And the wound that you observed to her chest area, the left side of her chest, would you characterize that as an entry or an exit wound?

A. I classified that as an exit wound.

Q. Were there any intermediate targets, in your opinion, that a bullet would have struck prior to striking Annette Stevenson with regard to the wounds we've just discussed?

A. In my opinion, the bullet passed straight – straight on.

Q. So it – the – the wound that entered the back and exited the chest didn't hit any other target before hitting Ms. Stevenson?

A. Yes, ma'am.

* * *

[269] Q. (BY MS. BURKS) And where would the exit wound to the chest have been?

A. It was over the left breast area, left chest – or left chest wall.

Q. As part of your autopsy when you're looking at entry and exit wounds, do you determine the direction of travel or the path, if you would, of the bullet?

A. Yes, ma'am.

Q. And what did you determine the path of the bullet to be in this case?

A. I decided that the bullet passed upward, back to front, and left to right.

Q. Could this entry and exit wound be consistent [270] with someone who was bending forward or ducking?

A. I – in my opinion, it – it would be consistent with somebody leaning forward.

Q. Now, this wound, can you tell the jurors what type of injuries a person would have sustained as a result of that entry and exit wound, or what type of injuries Ms. Stevenson sustained.

A. Do you – are you questioning what – what it did when it went in, ma'am?

Q. Yes. Yes, Doctor.

A. It went through the eighth left posterior rib at the – the projectile fractured that. Then it went to the – went through the spleen, then the liver, then the heart, and then it exited over the left chest area here.

Q. Was this a fatal shot?

A. Yes, ma'am.

* * *

[278] Q. Now Dr. Sisler, were you also called upon to conduct the autopsy of Queshawn Stevenson in Case Number 0804134?

A. Yes, ma'am.

Q. And what was the approximate age of Queshawn Stevenson?

A. I have listed five years.

* * *

[279] Q. And upon your inspection of Queshawn Stevenson, did you notice any injuries or abnormalities to her?

A. Yes, ma'am.

Q. Can you describe those for the jury.

A. First I found a gunshot wound of the left side of the abdomen. In medical terms, we use "left flank." That exited the right – the exit wound was located over the right abdomen. Then I found another gunshot wound of the left shoulder that went through the subcutaneous tissue and then exited the base of the left neck.

* * *

[281] Q. * * * Can you kind of go through and show the jury what each of these wounds are and what this diagram is showing?

A. The lower left diagram shows the entrance wound that I mentioned before along the left flank to the left side of the abdomen. Then the top left shows where the projectile exited.

Q. And so when we see Wound A, it cor – that's the entry wound which corresponds to the Exit Wound A above it?

A. Yes, ma'am.

Q. And the other – the other wound?

A. The other wound was over the – the left shoulder. And that went along the subcutaneous tissue and then exited the left – the base of the left lateral neck.

Q. Let's discuss Wound A first. Let me show you what's been marked as State's Exhibit 223. Can you tell the jury what we're looking at here in State's Exhibit 223?

A. Yes, ma'am. This is the entrance wound of the left side of the abdomen or left flank.

Q. Did you notice anything about the shape or the size of the wound that we see in this photograph?

[282] A. It indicated to me that there was – the wound passed straight on, striking the individual without passing through an intermediate target.

Q. So this was a direct shot?

A. Yes, ma'am.

Q. And it entered on, I believe you said, the left side of the – the left flank area?

A. Yes, ma'am.

Q. And where did that – that wound exit?

A. The right abdomen, ma'am.

* * *

[283] Q. Can you describe for the jury what type of injuries Queshawn sustained as a result of, this wound?

A. There were multiple perforations or defects of the small intestine. And then there were massive defects of the vessels that supply the – the colon is supplied through vessels that pass through connective tissue. There were several tears of the vessels in the soft tissue that supplies the intestine.

* * *

Q. Was this a fatal wound for Queshawn Stevenson?

A. Yes, ma'am.

* * *

[284] Q. And can you show us where the entry wound and exit wound of Wound B would be in State's Exhibit 227?

A. The entry wound and then the exit wound?

Q. I'm sorry, Wound B.

A. The left – the left shoulder. And then it exited, went up through the soft tissue, and then exited at the base of the lateral side of the left neck.

Q. What type of injury did Queshawn sustain as a result of Wound B?

A. Mostly subcutaneous hemorrhage, tearing.

Q. Dr. Sisler, let me show you what's been marked.

* * *

Q. And did you notice anything about this wound?

A. I would say that the bullet struck straight on.

* * *

[285] Q. Did you notice anything about the damage to the tissue with regard to this injury?

A. It's extensive hemorrhage and tearing of the tissue.

* * *

REPORTER'S RECORD

VOLUME 20 of 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL
VS.	DISTRICT
ERICK DANIEL DAVILA	COURT NUMBER ONE
	TARRANT COUNTY,
	TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 19th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[52] (Open court. Defendant present, no jury.)

THE COURT: Both sides have seen the Court's – I'm sorry, the jury note which is marked as Jury Note No. 2 and entered, and the Court's proposed responses. And are there any objections to the Court's proposed response?

MR. FORD: May I respond? Judge, may I respond? May I approach and look at –

THE COURT: Yes.

MR. FORD: – both of them, Judge?

MR. GILL: May I double-check them also, Your Honor?

THE COURT: Yes

MR. GILL: Just to make sure that they're what we looked at. I think they are.

THE COURT: All right. And what says the State? Are there –

MR. GILL: We have no objections –

THE COURT: – any objections to the –

MR. GILL: – Your Honor. No objections.

THE COURT: Which would actually be two separate responses. One referring to the Charge, and the other giving an additional charge on the law.

MR. GILL: We have no objection to either response.

[53] MR. FORD: We object to – what – what we request the Court do is to send the original response the Court had regarding intentionally and knowingly.

THE COURT: Which refers to the law and defines it.

MR. FORD: That's right.

THE COURT: Right.

MR. FORD: And wait. And – until the jury indicates they can't reach – reach a resolution. And

then at that point, submit the other special charge, if it's called for, Judge. We'd object to submission of both charges – well, we'd object to the submission of the second charge.

* * *

THE COURT: All right. I'm gonna overrule your objection and send both responses. They're both filed-marked, and they'll be in the records of the Court.

* * *

(Jury continued deliberating)

* * *

[58] GABRIEL RAMOS,

having been duly sworn, testified as follows:

* * *

[88] Q. Okay, Mr. Ramos. Before we broke, I had asked you if you today in the courtroom see the individual that had the –had the gun on Joe on April the 4th of 2008. And do you see that individual in the courtroom?

A. Yes.

Q. Would you please point him out to the jury and describe what he's wearing.

A. He's sitting at the far end of that side of the table, and he's wearing a gray suit.

MR. GILL: Your Honor, may the record reflect he's identified the defendant?

THE COURT: It will so reflect.

Q. (BY MR. GILL) And what was that individual doing with Joe while you were watching?

[89] A. He had a – he pointed a gun to his head, and then was asking him for the money. And – and as soon as he came up and pointed the gun at his head, Joe just went down to the ground, and he had him on the ground telling him to give him the money.

Q. Well, was he – was he saying it like you're saying it now?

A. No, I mean, he was cussing at him and . . .

Q. Well, what was he saying, and how was he saying it?

A. I can't really recall word by word, but like he was telling him probably like, Give me the fucking money, bitch. And this and that, you know.

Q. You're going like this with your hand; what does that mean?

A. Well, he was – he had the gun on him like this, and he was, like, kind of – kind of like poking at him on his head with the gun.

Q. So he had the – he had the – this individual right over here, this man right over here, had a gun pointed at Joe's head?

A. Right.

Q. And was demanding money from Joe?

A. Right.

* * *

[90] Q. And when – when the man over here found out Joe didn't have any money, what happened?

* * *

A. I think he was getting more, like, pissed off. I guess when Joe was first finished showing him he didn't have anything, he kept, you know, keep cussing at him, telling him to tell him where the money was at. So I guess at that time Joe thought, you know, he was gonna get shot, so he just kind of put his hand up like this and telling him, you know, "Please, please, I don't have [91] anything." And he was telling him, you know, Shut up, bitch. And this, this and that.

* * *

NO. 1108359D

THE STATE OF TEXAS	§	CRIMINAL DISTRICT
	§	COURT
VS.	§	
ERICK DANIEL DAVILA	§	NUMBER ONE IN
	§	AND FOR
	§	
	§	TARRANT COUNTY,
	§	TEXAS

COURT'S CHARGE

MEMBERS OF THE JURY:

The defendant, Erick Daniel Davila, stands charged by indictment with the offense of capital murder, alleged to have been committed on or about the 6th day of April 2008, in Tarrant County, Texas. To this charge, the defendant has pleaded not guilty.

A person commits an offense of "capital murder" if he commits murder and murders more than one person during the same criminal transaction. A person commits an offense of "murder" if he intentionally or knowingly causes the death of an individual.

"Individual" means a human being who is alive.

"Deadly weapon" means a firearm.

"Firearm" means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

A person acts "intentionally," or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

You are instructed that no evidence obtained by an officer in violation of any provision of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case. Our law permits the arrest of an accused under a warrant when there is sufficient probable cause to support the issuance of the warrant.

By the term "probable cause" is meant where the facts and circumstances within the officer's affidavit, and of which he has reasonably trustworthy information, would justify a reasonable and prudent person in believing that a particular person has committed a crime.

Therefore, bearing in mind the foregoing instruction if you believe that the affidavit for arrest contained sufficient probable cause to support the arrest of Erick Daniel Davila you may consider the arrest of the defendant and all evidence derived from it. If you have a reasonable doubt that the affidavit contained sufficient probable cause to support the arrest of the defendant, you may not consider the arrest of the defendant or any evidence derived from it.

Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of capital murder as charged in the indictment and next consider the lesser included offenses of murder.

A person commits an offense of "murder" if he intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death.

Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did with the intent to cause serious bodily injury commit an act clearly dangerous to human life that caused the death of an individual, Queshawn Stevenson, by

shooting her with a deadly weapon, to wit: a firearm, then you will find the defendant guilty of the offense of murder of Queshawn Stevenson.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of the murder of Queshawn Stevenson and next consider the offense of murder of Annette Stevenson.

Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did with the intent to cause serious bodily injury commit an act clearly dangerous to human life that caused the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, then you will find the defendant guilty of the offense of murder of Annette Stevenson.

* * *

/s/ Sharen Wilson
JUDGE SHAREN WILSON
Criminal District Court No. 1
Tarrant County, Texas

VERDICT FORMS

We, the Jury, find the defendant, Erick Daniel Davila, guilty of the offense of capital murder as charged in the Indictment.

/s/ Alfredo Mata
Foreman

For the Judge, a question.

We need a clarification of the capital murder charge.

In a capital murder charge, are you asking us did he intentionally murder the specific victims or are you asking us did he intend to murder a person and in the process took the lives of 2 others.

/s/ Alfredo Mata
JURY FOREMAN

[Alfredo Mata]

STB, 205 pm

JURY NOTE
#2

CASE No. 1108359D

THE STATE OF TEXAS	§	IN CRIMINAL
	§	DISTRICT
VS.	§	
ERICK DANIEL DAVILA	§	COURT NUMBER
	§	ONE
	§	
	§	TARRANT COUNTY,
	§	TEXAS

RESPONSE TO JURY NOTE NO. 2

MEMBERS OF THE JURY:

With regard to the charge of capital murder, the definitions of "intentionally" and "knowingly" on page 1 define the mental states referred to in the application paragraph on the top of page 2. These portions are repeated below:

A person acts "intentionally," or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.

A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of capital murder as charged in the indictment and next consider the lesser included offenses of murder.

/s/ Sharen Wilson
Judge Sharen Wilson
Criminal District Court #1

CASE No. 1108359D

THE STATE OF TEXAS	§	IN CRIMINAL
	§	DISTRICT
VS.	§	
ERICK DANIEL DAVILA	§	COURT NUMBER ONE
	§	TARRANT COUNTY,
	§	TEXAS

RESPONSE TO JURY NOTE NO. 2

MEMBERS OF THE JURY:

The Court gives the additional charge on the law as follows:

"A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, harmed, or otherwise affected."

/s/ Sharen Wilson
Judge Sharen Wilson
Criminal District Court #1

REPORTER'S RECORD

VOLUME 21 of 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
VS.	COURT NUMBER ONE
ERICK DANIEL DAVILA	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 20th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[8] THOMAS WAYNE BOETCHER,

having been duly sworn, testified as follows:

* * *

[9] Q. Now, in your – in your capacity as a – as a violent crimes homicide investigator, did you have – were you a participant in the interrogation of Erick Davila on 4/8 – April 8th of 2008?

A. Yes, I was.

* * *

Q. And were you present when the Defendant gave three statements regarding the murder he committed at 5701 Anderson?

[10] A. Yes, I was

Q. And at the conclusion of his giving of those three statements, was there something else that you-all wanted to talk to him about?

A. Yes, there was.

Q. And what was that?

A. It was an additional murder case that was unsolved at the time that we wanted to discuss with him.

* * *

[20] Q. Starting with the date, would you read that to the jury, please?

A. (Reading) Date, April the 8th of 2008. Starting time, 8:45.

[21] My name is Erick Davila, and I'm 21 years of age. My date of birth is 4/4/87. I live at 7504 Butterfield Circle, Apartment 707. My phone number is (817) 696-6217. I have completed eleven years of schooling. I can –

It says, I can/cannot read, write and understand the English language.

First paragraph states: On the first part of the month, it was 4 Trey Day, April the 3rd. That's how I remember the day. I went to the convenience store on

East Lancaster by the French Quarters. A friend of mine named Taylor [sic] was with me. We call him T. He hangs around East Lancaster. He wears red. He is not put down with any particular set.

I was driving Nichcole's car, and Taylor was with me on the passenger side. We both went into the store, and when I came out and started up the car, I let my window down on the driver's side, and then this old school man walked up to me. He was a black male about 37 years old. He walked up to me on the driver's side of the car while I was sitting in it. He didn't say nothing to me, he just pulled a pistol out on me and pointed it to my head.

I thought I was going to die in the car. I wait – I waited for Taylor, and he didn't come out. [22] I – I told – I told him what happened, and he was surprised. We hung around the back of the apartments and smoking. We stayed out there all day, and finally went to leave around 4 00 a.m. When we went to the store, we seen the dude talking to the lady and another dude –

MR. GILL: Excuse me, Detective, I believe you skipped a line. Right here, starting right here. Actually, I think you started – you skipped right here. "When we went to leave."

* * *

[23] A. * * *

When we went to leave, we seen the dude talking to the lady and another dude. We were in the front of the store. The store was closed, and I got the strap from

the back of the apartments earlier to get him. I told Tyler to let me off on East Lancaster, and I was going to walk up there.

I went up to the store, and I was walking – as I was walking to him, the guy said to me, what's up? And then he said, What's up G Money? I said, What, and I let him have it. I shot him as he walked towards me, and then I went and got back in the car with. Tyler and went home. I shot him because he had drawn down on me earlier in the day and pointed a gun at my head.

Q. All right. And who is that signed by?

A. The defendant, Erick Davila.

Q. And do you see that person in the courtroom today who signed that statement?

A. Yes, I do.

Q. Would you point him out, please, to the jury and describe what he's wearing today.

A. He's the person to the left of me, and he' s wearing a gray suit and tan shoes.

[24] Q. If I'm in position two here at this table and Ms. Burks is in one, which position is he in?

A. He would be in – you're in two, three and he's . . .

Q. One, two.

A. Oh, I'm sorry, over there? He's in position five to my far left.

MR. GILL: May the record reflect he's identified the Defendant?

THE COURT: It will so reflect.

* * *

[70] TANNA MARTINEZ,

having been previously sworn, testified as follows:

* * *

[78] Q. Okay. So you had paid some attention to the vehicle because of the conversation you were having with Darrell?

A. Yes.

Q. What did you see happen next once the car came out of the Sunrise Apartments?

A. It turned onto Roseland and went towards Norma Street. When it got between Lancaster and Norma Street, it slowed down at the back gate of French Quarters, the exit gate.

Q. And is the French Quarters, was it also called. La Hacienda?

A. Yes, ma'am.

Q. Okay. So what happened next?

A. Then that gentleman walked from the Sunrise apartment complex in the parking lot. He had his head down. Tricky asked him, "What's up?" He didn't say nothing, he didn't raise his head. Tricky said, "Are you good?"

Q. And what does that mean?

[79] A. "Are you looking for anything?"

Q. All right.

A. The gentleman didn't say nothing. He reached behind him like this. I was – I was standing there, and I had my two fingers in Tricky's back pocket. And he said, "Oh, shit, babe, run!" And that's when I seen him pull out a gun. And I wanted to run, and I fell. And I heard pow, pow. And I turned back around, and I seen Tricky run and hit the ground.

Q. And what happened next?

A. He walked over to Tricky and shot him four more times in his back.

Q. And you say – do you see that person in the courtroom that did this?

A. Yes, ma'am (witness crying).

Q. Can you point to him and identify an article of clothing that he's wearing?

A. He's wearing a gray suit and glasses, ma'am.

Q. And if I'm in position number one and you count around the table, what number would he be?

A. Five.

MS. BURKS: Your Honor, may the record reflect the witness has identified the defendant?

THE COURT: It will so reflect.

* * *

REPORTER'S RECORD

VOLUME 2 of 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
VS.	COURT NUMBER ONE
ERICK DANIEL DAVILA	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 23rd day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[154] MICHAEL THOMPSON,

having been duly sworn, testified as follows:

* * *

BY MR. GILL:

Q. Tell the jury your name, please.

A. Michael Howard Thompson.

Q. And how are you employed?

A. Tarrant County Sheriff's Department detention officer.

* * *

[159] Q. And in C and D tank, were you going to take those two tanks together up to the gym?

A. Yes, sir.

Q. Did you have any people from those two tanks that wanted to go to the gym?

A. Yes, sir.

Q. Do you remember how many inmates you had that wanted to go to the gym?

A. I believe it was a total of about five.

* * *

[161] Q. And did you get the inmates into the gym and locked in there like they were supposed to get in there?

A. Yes.

Q. Okay. And after they got in there, did anything unusual happen?

A. I went to the other gym and started the paperwork, and they got my attention to come back over there.

Q. How did they get your attention?

A. Just yelling through the door crack down the hallway.

* * *

[162] Q. What did you do?

A. I went back to see what they wanted. They said they wanted to go to the other gym because that gym had some water on the floor. It had been raining the night before, if I remember right, and that other gym does typically stay a little drier, so I agreed that they could go to the other gym, at which point I opened the door and they all filed out.

Q. So the basketball gym had some water on the floor?

A. Yes, sir.

* * *

[163] Q. And you said that the other gym – what's the other gym called or designated?

A. That would be the east gym, or the volleyball gym.

Q. The volleyball gym leaks a little bit less?

A. A little bit less.

Q. And so you felt that would be a little drier for them?

A. Yes.

Q. So you had – you had the discretion to allow them to change gyms?

A. Yes, sir. That was our decision.

Q. And so did the inmates go from one gym to the other without incident?

A. Until we got to the other gym.

Q. Then what happened?

A. As the inmates were filing into the gym, just as I thought it was the last one to go in, I started to close the slider door, at which point I see an inmate run back out of the gym to my left, and I saw another inmate run behind him and then I saw a third, and about that time, what I remember is a little sketchy because I [164] started getting hit.

Q. Well, do you see any of those three inmates in the courtroom today that ran by you out of the gym area back out into, the hallway?

A. Yes, sir.

Q. Would you please point him out and describe what he's wearing today'?

A. Wearing a suit.

Q. And where is he – please point to him and describe where he is located in the courtroom.

A. Over here, sir.

Q. If Ms. Burks is in Position 1 and I'm in Position 2 and counting on down the way, what position is he in?

A. He would be Position 5.

MR. GILL: Your Honor, may the record reflect he's identified the defendant?

THE COURT: It will so reflect.

* * *

[165] Q. And you said that you were hit. What were you being hit with while you were out in that hall way area?

A. At that point, I really don't know. I know it was his fist or something. I don't know. I was just being hit from all sides, so I have no idea.

[166] Q. Were they hard blows –

A. They were very hard blows.

Q. And then you said something about being pushed?

A. One – I was pushed into the gym. The door was still open, and I tripped over that and fell into the gym itself.

Q. And what happened after you got back into the gym?

A. Well, I was on the ground, and then I proceeded to get hit more, kicked in the head. I felt my shirt being ripped off of me. I felt my wallet being taken

out of my back pocket. I heard my keys being removed from my holster, and I proceeded to get kicked and beaten again quite a few times.

Q. And were the inmates saying anything to you while this was going on?

A. One of them said, we're going to kill you, and then said, where's the escape route, how do you get out of here. I told them there wasn't one. They weren't too happy with that answer. I was hit some more times, and they already had my keys. I knew I couldn't regain control, so I knew if I sent them down to the fire escape, that would give me time to get some help, knowing that they could not get out.

* * *

[167] Q. After you told them to head for that fire escape, what happened next?

A. They left. I managed to get myself up off the floor, walked back into – out of the gym, back into the hallway. That's when I saw my partner. She was laying [168] face down in the hallway bleeding.

* * *

Q. And what kind of condition were you in?

A. Bleeding very badly. I had – unknown to me at the time, but I had a very large cut here on my left cheek and a cut above my left eye and a big knot over [169] here on my left side of my head.

Q. Now, you had mentioned that you had seen your partner up on 2-8?

A. Yes, sir.

Q. And I don' t remember if you told us her name.

A. Otterson, O-T-T-E-R-S-O-N, first name, Teresa.

Q. And you said she was bleeding –

A. Yes, Sir.

Q. – as well?

Tell the jury exactly what the condition she was in.

A. When I saw her that time, she was prone face down, bleeding very profusely from her head, and there was at ready a pool of blood on the floor, so I don't know how long she had been there.

* * *

[173] Q. What does that show?

A. That's the cut on my left cheek.

Q. Just a long – probably six-inch long laceration or so?

[174] A. Yes, sir. I believe it took 11 stitches.

Q. It took 11 stitches?

A. Yes, sir.

Q. Do you still carry a scar from that today?

A. Yes, I do.

MR. GILL: Your Honor, can he turn and show the jury where that scar is located?

THE COURT: Yes.

Thank you.

Q. (BY MR. GILL) And 289?

A. Yes, Sir.

Q. What does that show?

A. Some sort of an abrasion on my right cheek, it would appear.

Q. And your right eye is blackened?

A. Yes, sir.

Q. You have abrasions to your nose, your cheek?

A. Yes, sir.

Q. 290?

A. Yes, sir.

Q. What does that show?

A. Some cuts in my scalp, and looks like on my right – part of my forehead.

Q. So basically you were just struck all over your – all over your head?

[175] A. Yes, sir.

Q. And 291?

A. Yes, sir.

Q. Tell the jury what that shows, please.

A. Some markings on my back. I don't remember receiving them, but apparently I did.

Q. That's not how your back normally looks?

A. Not normally, no, sir.

Q. You have quite a few abrasions and some bruises on your back?

A. Yes, sir.

* * *

REPORTER'S RECORD

VOLUME 23 OF 35 VOLUMES

Trial Court Cause No. 1108359D

THE STATE OF TEXAS	IN THE CRIMINAL DISTRICT
VS.	
ERICK DANIEL DAVILA	COURT NUMBER ONE
	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

BE IT REMEMBERED that on the 24th day of February 2009, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Sharen Wilson, judge presiding, held in Fort Worth, Tarrant County, Texas.

* * *

[108] JULIAN TORRES,

having been duly sworn, testified as follows:

* * *

[113] Q. And did all five inmates enter the – the gym –

A. Yes.

Q. – that gym?

A. Yes, sir.

Q. And after y'all got – were put in the gym, what happened next?

A. Me and Christopher Shaw went and got – got the handball and were fixin' to start playing handball. The other three gentlemen, they – they grouped up in the corner and just were talking over there amongst they selves.

* * *

Q. Then what happened?

A. Then the – I don' t know. At that time they requested to get moved out of that gym to the officer, and the officer moved us to another area of the gym.

Q. What – what – what was the reason they made a request to move out of that area?

A. They said that the floor was wet or something.

Q. And so did the officer come and take care of that?

[114] A. Yes, sir.

Q. And what did he do?

A. He came and told us to come on, he was gonna put us in the other side.

* * *

Q. And did the officer put y'all in the gym over there?

A. Yeah, well, me and Christopher Shaw made it into the gym over there.

Q. And what happened with the other three inmates?

A. They attempted to take over the – the facility or the – with the officer at that time.

Q. How did they do that?

A. By beating him and stabbing him.

* * *

[115] Q. * * *

Which three inmates were involved in the beating of the officer?

A. The – Erick Davila, Hurd and Edwards.

Q. And were all three of them beating the officer?

A. Yes.

Q. And who – who appeared to be doing what?

A. They all just been forcefully trying to drag him into the – into the rec area. And the officer was just trying to hold on, and you know, they were just beating him.

Q. And where on the officer's body were they beating him?

A. Throughout the face, head, body.

Q. And you said that – that they were also stabbing him?

A. Yes.

* * *

[116] Q. And what happened once he got into the rec area?

A. They slammed him on the floor, put his arms out in front of him, started kicking him, hitting him, stabbing him trying to rip his uniform off.

Q. And during – during this period of time, were they saying anything to the officer?

A. Just that, I'll kill you, and you know, you don't know me, you don't know what I'm in here for. I [117] have nothing to lose. How do you get out of this building?

* * *

Q. In particular, did you hear this man over here, Truman, say any particular thing to that officer?

A. Told him he didn't have nothing to lose, that – that he – that he didn't – he said, You don't know what I'm in here for, I don't got nothing to lose, I'll fucking kill you.

Excuse my language.

Q. And did they continue to beat the officer?

A. Yes.

Q. And where – at this point, where was the beating taking place?

A. In the rec area on the floor.

Q. How long did that continue?

A. For a good little while.

* * *

[118] Q. At some point did the beating on the officer discontinue?

A. Well, yeah, it stopped 'cause Erick Davila was running back and forth trying to open up the door. And then the other one, Hurd, went out and tried to take off his – he was trying to take off the officer's uniform. And Edwards was just stomping on his head after he was holding his arms out saying, how the heck – how the fuck are you gonna get out this building?

* * *

[119] Q. At some point did they all leave the gym area?

A. Yes.

Q. And what happened after they all left the gym area?

A. Well, the officer attempted to get up, he got up, he staggered out, he went – he went out in the – in the hallway. We heard something, some commotion, but then we heard, like – like – like something fall, something heavy. We went and looked out, and we seen Ms.

Otterson, another rec officer, that was laying on the floor with what appeared to be a stab wound to her stomach asking us to help. She was all bloody, and you know, her hair was all messed up in a way that she wouldn't present herself.

* * *

CAUSE NO. 76,105

IN THE

COURT OF CRIMINAL APPEALS OF TEXAS

ERICK DANIEL DAVILA
Appellant
VS.
THE STATE OF TEXAS
Appellee

APPELLANT'S BRIEF

Appeal of Cause No. 1108359D
Out of Criminal District Court Number One
of Tarrant County, Texas
The Hon. Sharen Wilson, Presiding

ORAL ARGUMENT IS NOT REQUESTED

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* * *

APPELLANT'S POINTS OF ERROR (ISSUES PRESENTED)

POINT OF ERROR ONE

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR THE OFFENSE OF CAPITAL MURDER BECAUSE THE STATE FAILED TO PROVE THE REQUISITE ELEMENT OF INTENT. ***(Record in its Entirety).***

POINT OF ERROR TWO

THE EVIDENCE IS FACTUALLY INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR THE OFFENSE OF CAPITAL MURDER PURSUANT TO ***CLEWIS v STATE, 922 S.W. 2nd 126 (Tex. Crim. App. 1996). (Record in its Entirety).***

POINT OF ERROR THREE

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS THREE WRITTEN STATEMENTS ADMITTING TO THE COMMISSION OF THE OFFENSE OF CAPITAL MURDER PURSUANT TO ***Franks v Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978)*** IN VIOLATION OF ***THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. (CR. I-185-87, IX-1919-21; RR. XVI-170-245, XVII-175-208, XXIX-SE #117, XXXIV-DE #89, #102).***

POINT OF ERROR FOUR

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS THREE WRITTEN STATEMENTS ADMITTING TO THE COMMISSION OF THE OFFENSE OF CAPITAL MURDER PURSUANT TO ***Franks v Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978)*** IN VIOLATION OF ***ART. I, SEC. 9 OF THE TEXAS CONSTITUTION AND ARTS. 1.06, 15.04, 15.05, AND 38.23 OF THE TEXAS CODE OF CRIMINAL PROCEDURE (VERNON 1965, 1987). (CR. I-185-87, IX-1919-21; RR. XVI-170-245, XVII-175-208, XXIX-SE #117, XXIV-DE #89, #102).***

POINT OF ERROR FIVE

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT ADMITTING TO THE COMMISSION OF AN EXTRANEOUS MURDER OFFENSE PURSUANT TO ***Franks v Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978)*** **IN VIOLATION OF *THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. (CR. I-185-87, IX-1919-21; RR. XVI-170-245, XXI-8-20, XXIX-SE #117, XXXIV-DE #89, #102).***

POINT OF ERROR SIX

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT ADMITTING TO THE COMMISSION OF AN

EXTRANEOUS MURDER OFFENSE PURSUANT TO ***Franks v Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978)*** **IN VIOLATION OF** ***ART. I, SEC. 9 OF THE TEXAS CONSTITUTION AND ARTS. 106, 15.04, 15.05, AND 38.23 OF THE TEXAS CODE OF CRIMINAL PROCEDURE (VERNON 1965, 1987). (CR. I-185-87, IX-1919-21; RR. XVI-170-245, XXI-8-20, XXIX-SE #117, XXXIV-DE #89, #102).***

POINT OF ERROR SEVEN

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS THREE WRITTEN STATEMENTS ADMITTING TO THE COMMISSION OF THE OFFENSE OF CAPITAL MURDER PURSUANT TO ***THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. (CR. I-185-87; RR. XVI-245-303, XVII-175-208).***

POINT OF ERROR EIGHT

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS THREE WRITTEN STATEMENTS ADMITTING TO THE COMMISSION OF THE OFFENSE OF CAPITAL MURDER PURSUANT TO ***ARTICLE 1, SECTION 10 OF THE TEXAS CONSTITUTION AND ARTICLE 38.22 OF THE TEXAS CODE OF CRIMINAL PROCEDURE ANN. (VERNON 2001). (CR. I-185-87; RR. XVI-245-303, XVII-175-208).***

POINT OF ERROR NINE

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT ADMITTING TO THE COMMISSION OF AN EXTRANEOUS MURDER OFFENSE PURSUANT TO ***THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. (CR. I-185-87; RR. XVI-245-303, XVII-175-208).***

POINT OF ERROR TEN

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENT ADMITTING TO THE COMMISSION OF AN EXTRANEOUS MURDER OFFENSE PURSUANT TO ***ARTICLE 1, SECTION 10 OF THE TEXAS CONSTITUTION AND ARTICLE 38.22 OF THE TEXAS CODE OF CRIMINAL PROCEDURE ANN. (VERNON 2001). (CR. I-185-87; RR. XVI-245-303, XVII-175-208).***

POINT OF ERROR ELEVEN

THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST TO INCLUDE AN INSTRUCTION IN THE COURT'S CHARGE ON THE VOLUNTARINESS OF APPELLANT'S THREE STATEMENTS PERTAINING TO THIS OFFENSE PURSUANT TO ***ART. 38.23 TEX CRIM. PROC. CODE ANN. (VERNON 1987). (RR. XIX-137-58)***.

POINT OF ERROR TWELVE

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO PRECLUDE THE DEATH PENALTY AS A SENTENCING OPINION AND DECLARE ***TEX CRIM. PROC. CODE ANN. art. 37.071 (Vernon 2005)*** UNCONSTITUTIONAL ON THE GROUND THAT TEXAS LAW ALLOWS FOR A DEATH SENTENCE WITHOUT GRAND JURY REVIEW OF THE PUNISHMENT SPECIAL ISSUES. ***(CR. I-67-71)***.

POINT OF ERROR THIRTEEN

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S FEDERAL CONSTITUTION BASED OBJECTION TO THE SO CALLED "10-12" RULE IN TEXAS' DEATH PENALTY SCHEME. ***(CR. I-124-55)***.

POINT OF ERROR FOURTEEN

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION TO INSTRUCT THE JURY THAT THE SENTENCING BURDEN OF PROOF ON THE MITIGATION SPECIAL ISSUE LIES WITH THE STATE. ***(CR. I-74-83, IX-1936-37)***.

* * *

SUMMARY OF APPELLANT'S ARGUMENTS

The following is a summary of Appellant's points of error on appeal pursuant to ***Rule 38.1(g) of the Texas Rules of Appellate Procedure:***

POINT OF ERROR ONE:

Appellant was convicted of the offense of capital murder pursuant to ***sec. 19.03(7)(A) Tex. Penal Code Ann. (Vernon 2005)***. The evidence is legally insufficient to support his conviction because the prosecution failed to prove the requisite element that Appellant had the specific intent to kill two individuals. The factual scenario presented by the State was that Appellant, a Truman Street Blood, had a grudge against Jerry Stevenson, a Polywood Crip. The evidence in the record shows that Appellant's actions were consistent with the intent to kill Jerry Stevenson. Though two individuals were killed, the evidence in the record fails to show that Appellant had the specific intent to kill two people. Because the State failed to prove this element beyond a reasonable doubt the evidence is legally insufficient to support Appellant's conviction for the offense of capital murder.

POINT OF ERROR TWO:

The evidence is factually insufficient to support the jury's verdict for capital murder for the same reason as espoused in point of error one. The evidence, viewed in a neutral light, shows that Appellant had the specific intent to kill only Jerry Stevenson, and no one

else. The great weight and preponderance of the evidence overwhelmingly supports this theory. As a result, the evidence supporting Appellant's conviction for capital murder under ***sec. 19.03(7)(A) Tex. Penal Code Ann. (Vernon 2005)*** is too weak, beyond a reasonable doubt, rendering his verdict of guilt clearly wrong and unjust. Therefore, the evidence is factually insufficient to support the Judgment against Appellant for the offense of capital murder.

* * *

POINT OF ERROR ONE

THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR THE OFFENSE OF CAPITAL MURDER BECAUSE THE STATE FAILED TO PROVE THE REQUISITE ELEMENT OF INTENT. ***(Record in its Entirety).***

ARGUMENT AND AUTHORITIES

The United States Supreme Court in ***Jackson v Virginia, supra***, held that in a legal sufficiency of the evidence analysis the appellate court is required to view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. ***Jackson v Virginia, 443 U.S. at 319, 99 S. Ct. 2789; Laster v State, supra at 517; Bigon v State, 252 S.W. 3d 360, 366 (Tex Crim. App. 2008); Weaver v State, 265 S.W. 3d 523***

530 (Tex App. – Houston [1st Dist.] 2008, pet. ref'd). This Court relied upon the federal constitutional precedent established in ***Jackson v Virginia*** when it decided the cases of ***Benson v State, 661 S. W. 2d 708 (Tex Crim. App. 1982) (opinion on the State's second motion for rehearing) cert. denied, 467 U.S. 1219, 104 S. Ct. 2667 (1984) and Boozer v State, 717 S.W. 2d 608 (Tex Crim. App. 1984).*** In ***Benson*** this Court held that when the court's charge was correct for the theory of the case presented by the State, then the legal sufficiency of the evidence should be viewed by comparing the evidence to the indictment as incorporated into the court's charge to the jury. ***Benson at 715***. Because the State had failed to object to an unnecessary narrowing of an element in the court's charge in ***Benson***, this Court concluded that the evidence was legally insufficient to support the appellant's conviction. ***Benson at 715-16***. The same conclusion was reached in ***Boozer*** when the State neglected to object to the trial court's erroneous instruction regarding accomplice witness testimony. Comparing the State's evidence to the court's charge, the ***Boozer*** court was once again constrained to hold the evidence insufficient to support the jury's verdict. ***Boozer at 610-12***.

Dissatisfied with its analysis in the ***Benson/Boozer*** line of cases, this Court reexamined its standard of review in legal sufficiency of the evidence questions in ***Malik v State, 953 S.W. 2d 234 (Tex Crim. App. 1997).*** Reasoning that its holdings in the ***Benson/Boozer*** line of cases and their resulting progeny were

not prerequisites to the federal standard espoused in ***Jackson v Virginia*** ***(Malik at 236-40)***, the ***Malik*** court redefined the appellate standard of review as follows:

> The Benson/Boozer rule is based upon a misinterpretation of federal constitutional precedent, results in complex and inconsistent standards for reviewing sufficiency of the evidence, and is fundamentally at odds with the purpose behind the *Jackson* standard of sufficiency review. Therefore, we overrule the *Benson/Boozer* line of cases and abolish the standard of sufficiency review that they formulated. No longer shall sufficiency of the evidence be measured by the jury charge actually given. Nevertheless, we recognize that measuring sufficiency by the indictment is an inadequate substitute because some important issues relating to sufficiency – e.g. the law of parties and the law of transferred intent – are not contained in the indictment. [citations omitted]. Hence, sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not necessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. [footnote omitted]. This standard can uniformly be applied to all trials, whether to the bench or to the jury, whether or not the

> indictment is facially complete, and regardless of the specific wording of the jury charge actually given. Moreover, the standard we formulate today ensures that a judgment of acquittal is reserved for those situations in which there is an actual failure in the State's proof of the crime rather than a mere error in the jury charge submitted.
>
> ***Malik* at 239-40.**

***See, Villarreal v State*, 286 S.W. 3d 321, 327 (Tex. Crim. App. 2009) cert. denied, ___ U.S. ___, 130 S. Ct. 515 (2009); *Hardy v State*, 281 S.W. 3d 414, 421 (Tex Crim. App. 2009); *Grissam v State*, 267 S.W. 3d 39, 40 (Tex. Crim. App. 2008) aff'd on remand, 285 S.W. 3d 532 (Tex App. – Fort Worth 2009, pet. ref'd); *Mantooth v State*, 269 S.W. 3d 68, 76 (Tex App. – Texarkana 2008, no pet.).**

When measuring the evidence against a hypothetically correct jury charge, ***Malik*** ensures that the appellate court may not reevaluate the weight and credibility of the evidence and substitute its judgment for that of the fact finder. ***Lancon v State*, 253 S.W. 3d 699, 705 (Tex. Crim. App. 2008); *Venegas-Ortiz v State*, No. 8-08-063-CR, 2010 Tex App. LEXIS 2393, at *7 (Tex App. – El Paso March 31, 2010, no pet.) (not designated for publication); *Hartsfield v State*, 305 S.W. 3d 859, 862-63 (Tex App. – Texarkana 2010, no pet.).** Deference must be accorded to the responsibility of the trier of facts to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic to ultimate

facts. ***Williams v State, 235 S.W. 3d 742, 750 (Tex Crim. App. 2007); Hooper v State, 214 S.W. 3d 9, 13 (Tex Crim. App. 2007) aff'd on remand, 255 S.W. 3d 262 (Tex App. – Waco 2008, pet. ref'd); Jackson v State, 270 S.W. 3d 649, 652-53, 656 (Tex App. – Fort Worth 2008, pet. ref'd).***

In this case Appellant was convicted of causing the deaths of two individuals during the same criminal transaction. Capital murder is a result-of-conduct oriented offense. This means that the offense is defined by the defendant's objective to produce, or a substantial certainty of producing a specified result, which in Appellant's case, is the deaths of Queshawn and Annette Stevenson. ***See, Roberts v State, 273 S.W. 3d 322, 329 (Tex Crim. App. 2008). See also, Schroeder v State, 123 S.W. 3d 398, 400-01 (Tex Crim. App. 2003); Guzman v State, 20 S.W. 3d 237, 240 (Tex App. – Dallas 2000) pet. granted and rev'd on other grounds, 85 S.W. 3d 242 (Tex Crim. App. 2002)***. Due process mandates that the prosecution prove each and every element of the specified offense. ***In re Winship, 25 L.Ed. 2d 368, 373-74 (1970). See also, Hughen v State, 265 S. W. 3d 473, 484-85 (Tex App. – Texarkana 2008) pet. granted and aff'd on other grounds, 297 S.W. 3d 330 (Tex. Crim. App. 2009); Tijerina v State, 264 S.W.3d 320, 322-23 (Tex. App. – San Antonio 2008, pet. ref'd).*** The evidence is legally insufficient to uphold Appellant's conviction for this capital murder offense because the State failed to meet its burden of proof on the element of specific intent to kill two individuals.

This very issue, the specific intent to kill two or more persons during the same criminal transaction, was the gravamen of this Court's decision in ***Roberts***, ***supra***. Specifically, the ***Roberts*** Court was called upon to address the issue of whether the doctrine of transferred intent under ***sec. 6.04(b)(2) Tex. Penal Code Ann. (Vernon 1994)*** could be utilized by the prosecution to prove the requisite element of specific intent under ***sec. 19.03(7)(A) Tex. Penal Code Ann. (Vernon 2005)***. The appellant in ***Roberts*** was convicted of the capital murder of a woman and her unborn fetus. The evidence was undisputed that at the time of the offense the appellant was unaware of the woman's pregnancy. At the time of the shooting the woman's two-year-old child was present but miraculously survived the attack, unharmed. ***Roberts at 324-25***.

In holding that the doctrine of transferred intent could not be utilized to support the specific intent element under ***sec. 19.03(7)(A)***, and thus sustain the appellant's capital murder conviction, overruling that portion of ***Norris v State, 902 S.W. 2d 428 (Tex Crim. App. 1995)*** that decided the contrary, Judge Johnson, the author of *Roberts* explained:

> This conclusion [that ***sec. 6.04(b)(2)*** can be applied to ***sec. 19.03(7)(A)***] is at odds with the *Norris* Court's recognition that, for capital murder pursuant to Section 19.03(a)(6)(A),[4] each death must be intentional or knowing –

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[4] Obviously this statute predates the present one.

there must be a discrete "specific intent to kill" as to each death. A classic example of proper application of transferred intent is the act of firing at an intended victim while that person is in a group of other persons. If the intended person is killed, the offense is murder. If a different person in the group is killed, the offense is murder pursuant to TEX. PENAL CODE sec. 6.04(b)(2): "A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that: a *different* person or property was injured, harmed, or otherwise affected." (Emphasis added). In either case, there was one intent to kill and one resulting death.

If both persons are killed, we cannot use transferred intent to charge capital murder based on the death of the unintended victim, as that would require using a single intent to kill to support the requirement of two intentional and knowing deaths. Further, while sec. 6.04 permits the use of transferred intent if a *different* person is harmed; [footnote omitted] such use is not authorized if the intended victim is also killed, as that would permit one intent to kill to support more than one death. [footnote omitted] This is the fallacy of *Norris;* it permits the intent to cause one intentional or knowing death to support two deaths, one intentional and knowing, the other unintentional. We overrule *Norris* to the extent that it allows such use. Transferred intent may be used as to a second death to support a charge

> of capital murder that alleges the deaths of more than one individual during the same criminal transaction only if there is proof of intent to kill the same number of persons who actually died, e.g., with intent to kill both Joe and Bob, the defendant killed Joe and Lou. It may also be used if, intending to kill both Joe and Bob and being a bad shot, the defendant killed Mary and Jane. This resolution comports with *Aguirre v State*, 732 S.W. 2d 320 (Tex. Crim. App. 1982), but does not violate the plain language of sec. 6.04(b)(2) or sec. 19.03(a)(7).
>
> ***Roberts* at 330-31.**

The ***Roberts*** Court further reasoned that even if the appellant had formed an intent to kill the woman's daughter, and such intent could have been proven by the State, it would not have been sufficient to support his conviction on a legal sufficiency of the evidence challenge because no act of appellant toward the two-year-old would have resulted in the death of the embryo. ***Roberts* at 331**. In concluding that there was insufficient evidence in the record to prove that the appellant had the requisite intent to kill the woman's fetus Judge Johnson opined:

> . . . Appellant intended to kill A, and did so. If he is to be charged with also intentionally and knowingly killing a second person, in this case the embryo, by killing the mother, there must be a separate specific intent to do so. *See Lawrence* . . . [240 S.W. 3d 912 (Tex. Crim. App. 2007] *supra*] (shot pregnant girlfriend with

> specific intent to kill the embryo). It is undisputed that appellant did not know that Ms. Ramirez [decedent] was pregnant. Lacking knowledge of the embryo's existence, appellant could not form a separate specific intent to kill the embryo, as is required by statute.
>
> ***Roberts* at 331**

Just as the evidence was legally insufficient to support the appellant's capital murder conviction in ***Roberts***, on the element of specific intent, the same is true in the case at bar. The motive developed at trial to explain Appellant's actions, and the only scenario that passes the common sense test, was that Appellant, a Truman Street Blood, had a grudge against Jerry Stevenson, a member of the Polywood Crips. Three weeks before this offense Jerry and Appellant had been involved in a separate verbal altercation, again presumably due to their separate gang affiliations. ***(RR. XIX-61-80)***.

Throughout the trial the prosecution enthusiastically, as well as continuously, emphasized to the jury the bitter enmity between the Bloods and the Crips. ***(RR. XVI-136-38, 146-70; XVIII-31-70)***. The State's eye witness Eghosa Ogierumwense watched as Appellant specifically targeted only Jerry Stevenson with his laser sight. ***(RR. XIV-138, 144-45)***. One of the wounds sustained by Annette Stevenson was intermediate, meaning that it had struck other targets before entering her body. ***(RR-XVIII-265-73)***. The weapon utilized in this offense was described as high-powered. ***(RR. XVIII-158-59)***. With the ammunition used in it the

muzzle velocity was great. ***(RR. XVIII-158-59)***. Extrapolating from the testimony of the forensic firearms examiner, the bullets used in the rifle at the approximate range where Appellant was standing were capable of traveling through outside walls. Additional evidence developed at trial revealed that Appellant's far away vision was exceedingly poor. ***(RR. XIX-96-102)***.

It is apparent, in light of the State's developed motive for this shooting, that Appellant's sole intent was to kill Jerry Stevenson. The gangland dispute was with him. Appellant aimed his laser sight at Jerry alone. When Jerry stepped inside the residence before Appellant could get off his initial shot, Appellant fired solely at him, expecting his bullets to penetrate the outside wall and strike Jerry. Though motive itself is not an element that the prosecution is required to prove "evidence of motive is one kind of evidence [that aids in] establishing proof of an alleged offense. ***See, Crane v State, 786 S.W. 2d 338, 349-50 (Tex Crim. App. 1990); Pollard v State, 255 S.W. 3d 184, 188 (Tex App. – San Antonio 2008) pet granted and aff'd, 277 S.W. 3d 25 (Tex Crim. App. 2009)***. Appellant had no dispute with any other person present at the party. He fired at Jerry; unfortunately, he was a bad shot and two innocent people were killed by accident. This is the exact fact scenario which this Court in ***Roberts*** held to be insufficient to support a capital murder conviction under ***19.03(7)(A)***.

Because the evidence is legally insufficient to support the jury's conviction for capital murder, Appellant

respectfully prays that this Honorable Court reverse the trial court's Judgment and Sentence of Death and render a verdict of acquittal. ***See, Burks v United States, 437 U.S. 1, 98 S. Ct. 2141(1978) and Greene v Massey, 437 U.S. 19, 98 S. Ct. 2151 (1978).***

* * *

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UNDER TX R RAP RULE 77.3,
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OPINION
Do Not Publish

Court of Criminal Appeals of Texas.

Erick Daniel DAVILA, Appellant
v.
The STATE of Texas.

No. AP-76,105.
|
Jan. 26, 2011.

On Direct Appeal from Cause No. 1108359D in Criminal District Court Number One, Tarrant County.

Attorneys and Law Firms

Mary B. Thornton, for Erick Daniel Davila.

OPINION

COCHRAN, J., delivered the opinion of the unanimous Court.

Appellant was convicted of capital murder for shooting a five-year-old child and her grandmother during the same transaction.[1] Based upon the jury's

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[1] TEX. PENAL CODE § 19.03(a)(7)(A).

answers to the special punishment issues, the trial court sentenced appellant to death. On direct appeal to this Court, appellant raises fourteen points of error, including the sufficiency of the evidence to support his conviction. After reviewing all of his points of error, we find them to be without Davila Page 2 merit. Therefore, we affirm the trial court's judgment and sentence of death.

Factual Background

On April 6, 2008, eleven-year-old Cashmonae Stevenson, along with numerous friends and relatives, celebrated her sister Nahtica's ninth birthday at a "Hannah Montana" birthday party at her grandmother's home in the Village Creek Townhouses in Fort Worth.[2] Except for Cashmonae's uncle, Jerry Stevenson, all of the guests were women and children. About 8:00 p.m., just as the fifteen children were eating ice cream and cake on the front porch, Cashmonae saw a black Mazda slowly drive by. Inside was a man holding a gun with "a red dot" on it. Cashmonae "felt in her stomach" that something bad was going to happen because "no one ever rolled by with a gun pointed towards our house." Her uncle Jerry said, "The fool has a K in the car."[3] And then Cashmonae heard her

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[2] This neighborhood was known for gang-related violence, frequently between the Bloods, who used red as their "color," and the Crips, who used blue.

[3] Jerry later testified that he thought the rifle was an AK-47; in fact, it was an SKS. The two rifles are similar in appearance and function.

grandmother, Annette Stevenson, say, "They trying to find trouble."

A few minutes later Cashmonae saw a man run across the field, stand next to the house in front of theirs, and start shooting with "the red dot" pointed at their porch.[4] He kept shooting at them as the children and adults "stacked up on top of each other" as they tried to run through the front door. They were all screaming and trying to get to safe places inside. Cashmonae saw her uncle, Jerry Stevenson, lay his five-year-old daughter, Queshawn, down on the sofa. She was bleeding and looked dizzy. According to Jerry, "her guts was hanging out." After the gunshots ended, Cashmonae discovered that she had been shot in the elbow, the hand, and the shoulder. Nahtica and another little girl, Brianna, as well as Sheila Moblin, one of the adults at the party, had also been shot. Cashmonae's grandmother, Annette, had been killed, as had five-year-old Queshawn.

Meanwhile, just a couple of blocks away, Kent Reed was attending a different birthday party at his mother-in-law's home on Luther Court. While he was barbecuing, Kent saw a black car with customized vents pull up and stop. A man with distinctive-looking

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[4] Jerry Stevenson testified that he saw the gunman, dressed all in black, shooting at them, so he grabbed his son's hand, pulled him into the house, and threw him into a corner to protect him as he saw his mother stagger through the door and walk toward her bedroom. When Jerry saw that his daughter, Queshawn, was not inside, he ran to the door, and saw her lying on the front porch. He ran out, picked her up, and carried her back inside.

ears[5] and slashes in his eyebrows got out on the driver's side. It was appellant.[6] He was wearing a hoodie, black jeans, a baseball cap turned backwards, and red and black tennis shoes. Appellant was carrying a big gun with a red beam shining from it onto the ground. He knocked on the next-door neighbor's door, but no one answered, so he walked down a trail between the buildings toward the field. The passenger in the black car slid over into the driver's seat and sped off.

A few minutes later, Kent heard a series of distinctive shots, a pause, and then several more shots. He gave a written statement to the police that evening in which he described the car and the man that he had seen. The next day, Kent picked appellant out of a photo line-up.

Fifteen-year-old Eghosa, along with several of his friends, was at the same party with Kent. He noticed the man with a long rifle and a red-dot beam and, sensing something peculiar,[7] he and two friends followed the man as he walked between the buildings. Eghosa saw the man walk through the field, stand next to an air conditioning unit beside one building, and then

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[5] Appellant had a very large diamond-looking earring as well as a large silver bolt in his earlobe.

[6] Kent's wife, Arlette, also saw the black car and knew it was a Mazda. She saw appellant and could identify him by the distinctive earrings in his ears.

[7] The rest of the party-goers were also apprehensive at the sight of this silent man in black toting a big rifle with an infrared scope. They went inside the home on Luther Court.

take aim on the house across the street. He saw the man train the red beam from the rifle on Jerry Stevenson[8] ("Big Boy Dooney"), but when "Dooney" went inside, he moved the beam to the windows of the house. Eghosa saw "Granny" – Annette Stevenson – and the kids playing on the Stevenson's porch. Once "Dooney" went inside, the man started firing the gun. He trained the red beam on "Granny" who tried to shoo the children inside. Then Eghosa saw "Granny" get shot a couple of times; he could see the bullets hitting her as she fell in the doorway. The man shot about nine times while he was standing at the corner, then he ran to the middle of the street and shot several more times. The same car that Eghosa had seen the shooter get out of on Luther Court came around the corner and stopped. The shooter jumped into the driver's seat and then sped off. Eghosa said that the man appeared frustrated when he failed to hit "Dooney," and he lowered the rifle, but then raised it again and started firing once more.[9]

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[8] Jerry Stevenson testified that, about a week before the murders, he had intervened in what may have been a gang-related quarrel in front of his mother's home between some Bloods and his nephew, Gary, who was visiting. Jerry agreed that the apartment complex was known as Blood territory, but that his mother's house might have been identified as "a Crip house," even though no one at her home actually was a Crip member. One of appellant's fellow gang members testified that Jerry or "Dooney" was "never no threat" to the Bloods, so nobody had ever bothered him or his family members.

[9] Numerous other witnesses from the neighborhood also heard and saw the shooting and described appellant's actions as did Eghosa.

By the time the first police officer arrived, it was a chaotic scene. There was a dead woman – Annette Stevenson – in the back bedroom, a seriously injured child – Queshawn – on the couch in the living room, two more children with leg wounds in the dining room, blood splattered everywhere, and both adults and children screaming and trying to help or console the wounded and each other. Crime scene officers found four shell casings beside the air conditioning unit across the street and four more scattered in the street where the second series of shots had been fired. They photographed the bullet holes found all along the porch walls and in the windows of the Stevenson home.

Nichcole Blackwell testified that she and appellant were living together in April of 2008. She said that appellant had a "Truman Street Bloods" tattoo on his chest and he liked to wear the color red. He had a black rifle, but Nichcole told him to take it away because she didn't like guns. On Sunday, April 6th, appellant drove off in Nichcole's black Mazda 626 at about 3:00 p.m. He was wearing a black shirt and either red or black pants. He returned about 8:00 or 9:00 p.m., left again, returning around 11:00 p.m., and then left once more around midnight and finally returned around 4:00 a.m. and went to sleep. The next day Nichcole learned that her car might have been involved in the murders, so she called the police who asked her to come down and give them a statement.

Based upon the police investigation, Detective Brent Johnson obtained a warrant for appellant's arrest shortly after midnight on April 8th. That

afternoon, appellant was arrested and, over the course of seven hours, gave four written statements to the police. In his third statement,[10] appellant said that he and his friend Garfield were driving around in Nichcole's black Mazda when he decided that we can have a shoot em up. I told [Garfield] I was gonna drive to the back and to let me out of the car and for him to leave. I had the AK with me, but I didn't have the clip, so I had to go to Ms. Sheilas to get the clip. We went around to the back of the apartments and the AK has a scope and a red beam on it. I went up to Ms. Sheilas door carrying the AK. A little boy answered the door and I went in and got the clip that was right under the sofa. I got the clip and put it in the AK. When I went back outside I went through the field where the shooting happened. Ms. Sheilas house is kind of like a trap. That is where everybody goes to keep their guns and their weed.

> . . . When I told Garfield it was my hood and we were going to have a shoot em up, and I was going to scare them and let them know that I had a gun. . . . I had a scope on my gun, so I had range. I stood in the field across the street. The fat dude was in the middle of the street. The other 3 were on the porch. I wasn't going to give them a chance to get a gun. Garfield had stopped my car in the middle of Anderson and I thought they were going to start shoot up my car. I only let off ten rounds and

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[10] Appellant's fourth statement dealt with an extraneous murder, evidence of which was admitted during the punishment phase of trial.

> I had 21 in the clip. I was trying to get the guys on the porch and I was trying to get the fat dude. I wasn't aiming at the kids or the woman and don't know where the woman came from. I don't know the fat dudes name, but I know what he looks like, so I recognized his face.[11]

Appellant also explained that he had given his SKS semi-automatic rifle to "Terminal," a fellow Bloods gang member, the day after the murders. Terminal later led police to appellant's rifle, which had been covered in a dark shirt and left in a wooded area. The SKS had a folding stock, an infrared scope, and a bayonet affixed to it.

Sufficiency of the Evidence

In his first and second points of error, appellant claims that the evidence is legally and factually insufficient[12] to support his conviction for intentionally or knowingly causing the death of two people. He argues that he intended to kill only Jerry Stevenson and therefore his intent to kill Jerry cannot be transferred to the deaths of both Annette and Queshawn.

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[11] This excerpt is taken verbatim from appellant's written statement without change of syntax, spelling, or punctuation.

[12] After appellant had filed his Brief in this case, we overruled the *Clewis* line of cases regarding factual sufficiency in *Brooks v. State*, 323 S.W.3d 893 (Tex.Crim.App.2010). We held that the sole standard for measuring evidentiary sufficiency of the evidence is that set out by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Under Texas law, "[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . a different person or property was injured, harmed, or otherwise affected."[13] This concept is known as the doctrine of transferred intent. The issue of transferred intent is raised when the evidence shows that a defendant intends to harm one person but actually harms a different person instead.[14] The rationale for the rule is straightforward: murder requires the killing of another human being, but not of a particular human being.[15] The defendant wanted to kill one or more human beings; the fact that he did not manage to kill the very same persons that he intended to kill, does not exculpate him or diminish his criminal responsibility.

Appellant argues that the evidence shows that he intended to kill only one person, thus his one criminal intent can be transferred to only one of the victims, not

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[13] TEX. PENAL CODE § 6.04(b)(2).

[14] *See Manrique v. State*, 994 S.W.2d 640, 647 (Tex.Crim.App.1999) (McCormick, P.J., concurring); *Pettigrew v. State*, 999 S.W.2d 810, 812-13 (Tex.App.-Tyler 1999, no pet.) (affirming murder conviction of defendant who shot at a rival gang resulting in an innocent bystander being shot by a member of that rival gang); *see also Dowden v. State*, 758 S.W.2d 264, 272-73 (Tex.Crim.App.1988) (sufficient evidence supported capital-murder conviction where defendant initiated shoot-out in police station that resulted in friendly-fire death of different officer).

[15] *See generally*, Michael Bohlander, *Transferred Malice and Transferred Defenses: A Critique of the Traditional Doctrine and Arguments for a Change in Paradigm*, 13 New Crim. L.R. 555, 556 (2010).

both. In his Brief, appellant relies primarily upon our reasoning in a non-death-penalty capital-murder decision, *Roberts v. State*.[16] That case, however, is both factually and legally distinguishable from the present one. In *Roberts*, the evidence showed that the defendant intentionally or knowingly shot and killed Virginia Ramirez. He also caused the death of Ms. Ramirez's eight-to-nine-week-old fetus. The court of appeals had held that the defendant's intent to cause the death of Ms. Ramirez could also transfer over to the death of her unborn fetus.[17] This Court reversed the defendant's capital-murder conviction for intentionally killing two people.[18] Although there was ample evidence in the record that the defendant intended to cause Ms. Ramirez's death, there was no evidence that the defendant also intended to cause the death of her fetus because there was no evidence that he (or anyone else) knew that Ms. Ramirez was pregnant at the time of the murder. We explained,

> Transferred intent may be used as to a second death to support a charge of capital murder that alleges the deaths of more than one individual during the same criminal transaction only if there is proof of intent to kill the same number of persons who actually died, *e.g.*, with intent to kill both Joe and Bob, the defendant killed Joe and Lou. It may also be used if, intending to kill both Joe and Bob, and

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[16] 273 S.W.3d 322 (Tex.Crim.App.2008).

[17] *Id.* at 326-27.

[18] *Id.* at 327.

> being a bad shot, the defendant killed Mary and Jane.[19]

That latter scenario is precisely what happened in this case. The evidence shows that appellant intended to kill possible members of the Crips gang, but he mistakenly killed a grandmother and small child instead. As appellant himself explained, he went to "a shoot em up" in which he intended to kill "the fat dude in the middle of the street" and the three "guys on the porch." That is, he intended to shoot four males, not two females. But, under Texas law, the intent to kill four males will transfer to the unintentional killing of two females.[20] There is ample evidence in the record to support the jury's verdict that appellant intended to cause more than one death in his "shoot em up" attack. That evidence includes the following:

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[19] *Id.* at 331.

[20] *Id.; see, e.g., Pettigrew*, 999 S.W.2d at 812-13; *Grayson v. State*, No. 14-04-00226-CR, 2005 WL 1669537 *1-3 (Tex.App.-Houston [14th Dist.] July 14, 2005, pet. ref'd) (not designated for publication) (evidence sufficient to support murder conviction during neighborhood "gun battle" confrontation under transferred intent even though no witness actually saw defendant shoot victim); *Lawrence v. State*, No. 09-03-215-CR, 2005 WL 550705 *1-2 (Tex.App. – Beaumont March 9, 2005, pet. stricken) (not designated for publication) (murder conviction upheld; evidence sufficient under doctrine of transferred intent when evidence showed defendant intended to shoot Thomas, but hit Price instead); *Castillo v. State*, No. 07-00-0365-CR, 2001 WL 1044895 *1-2 (Tex.App. – Amarillo 2001, no pet.) (not designated for publication) (evidence sufficient to support defendant's "drive-by" murder conviction under transferred intent when evidence showed that he shot at pedestrian who had shouted at him, but hit and killed another person instead).

(1) Appellant gave a written statement explaining that he intended to "get the fat dude" and who he mistakenly thought were three guys on the porch;[21]

(2) Cashmonae testified (as did other witnesses) that appellant aimed the "red dot" at "different parts of the house" and at different persons;

(3) Appellant used a high-powered SKS semi-automatic rifle with an infrared beam to fire between ten to fifteen bullets into the group of women and children on Ms. Stevenson's front porch;

(4) Appellant fired a burst of bullets from one location across the street, then paused as he ran to the middle of the street and fired a second burst of bullets;

(5) Eghosa said that appellant looked "frustrated" after the first burst of fire when Jerry or "Dooney" had escaped into the house, so appellant moved and then fired a second burst at the remaining women and children;

(6) Appellant used a rifle with an infra-red scope that would give him greater precision in shooting at what he intended to hit;

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[21] Although appellant claims, in a separate point of error, that his confession should not have been admitted, in reviewing the sufficiency of evidence, we consider both properly and improperly admitted evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App.2007) (in conducting legal sufficiency review, courts assess "all of the evidence," including evidence that was improperly admitted).

(7) His semi-automatic SKS required him to pull the trigger each time he intended to shoot; thus he intended to shoot his targets at least ten to fifteen different times;

(8) Expert testimony that appellant's choice of bullets, high-powered hollow-point bullets, was consistent with a shooter who wants to cause maximum damage or death to his intended target.

Viewed in the light most favorable to the verdict under the appropriate *Jackson* standard,[22] we conclude that the evidence is sufficient to support the jury's verdict that appellant intended to (or knew that he was reasonably certain to) cause two deaths when he repeatedly shot his SKS semi-automatic rifle at the birthday party group on Ms. Stevenson's front porch. Appellant's first and second points of error are overruled.

The Validity of the Arrest Warrant

In his third, fourth, fifth, and sixth points of error, appellant contends that the trial court erred in denying his motion to suppress his four written statements because these statements were "the fruit" of an arrest

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[22] *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (judging sufficiency of evidence to support conviction by assessing "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."); *see Dowden v. State*, 758 S.W.2d 264, 272-73 (Tex.Crim.App.1988) (evidence sufficient to support capital-murder conviction of police officer under doctrine of transferred intent when defendant initiated a "shoot-out" at police station).

warrant that was based upon false information within the affidavit. He claims that, if the false information were deleted from that affidavit, the remaining, accurate information was insufficient to establish probable cause to arrest him.

Appellant relies on *Franks v. Delaware*,[23] for the proposition that only information that the affiant believes is truthful and accurate may be considered in establishing probable cause for a warrant.[24] In *Franks*, the Supreme Court recognized that, if an affirmative misrepresentation is knowingly or recklessly included in a probable cause affidavit in support of a search warrant and that misrepresentation is necessary to establish probable cause, the warrant is rendered invalid

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[23] 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

[24] In *Franks*, the Supreme Court stated,

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly or intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 155-56.

under the Fourth Amendment.[25] But an officer's mere negligence or innocent mistakes are insufficient to invalidate the warrant.[26]

The trial judge at a suppression hearing, even one involving a *Franks* claim, is the sole trier of fact and the judge of the credibility of the witnesses and the weight to be given the evidence .[27] Appellant claims that there is a conflict or inconsistency between two statements purportedly made by April Coffield to Detective Johnson in the arrest-warrant affidavit and in a recorded interview that the detective conducted with Ms. Coffield the day after the murders. The pertinent portion of the affidavit, with the disputed portions underlined, states the following:

> April Coffield was near the party at 5758 Luther Ct., visiting a cousin. I interviewed Coffield. Coffield saw what she believed to be a green Ford Focus drop a black man off in the 5700 block of Luther Ct. Coffield saw the man run toward the four bedroom town home at

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[25] *Id.* Appellant also invokes article I, § 9 of the Texas Constitution, and notes that an analysis under state constitutional law must be separate and distinct from its federal counterpart. But he provides no separate and distinct analysis of the Texas Constitution as a basis for his federal constitutional claim under *Franks*. Therefore, we decline to address any potential distinction between appellant's claim under the federal and Texas constitutions.

[26] 438 U.S. at 171.

[27] *Hinojosa v. State*, 4 S.W.3d 240, 247 (Tex.Crim.App.1999); *Janecka v. State*, 937 S.W.2d 456, 462 (Tex.Crim.App.1996).

the corner of Anderson. Coffield saw a red dot on the ground while the man was running. . . .

> Coffield stated that she heard shots fired as did Charlene Ogierumwense. *Coffield ran into house and then peeked out.* Coffield saw the man, who got out of the car on Luther Ct., standing in front of the apartment where the children's birthday party was in progress. He was holding a rifle. Coffield then saw the man fire into the apartment. The man fled on foot. Ken Reid[28] saw the car that dropped off the man speed away from the scene. A man came out of the apartment at 5701 Anderson. The man was "hollering." Coffield recognized that there was trouble. Coffield went into the apartment in an attempt to help. In the apartment, Coffield saw people who appeared to have been shot. . . .

Detective F. Serra III 2167 prepared photospreads containing Davila and five other black males of similar physical characteristics. Detective Boetcher and I showed the photospreads to witnesses. Ken Reid immediately picked Davila as the man he saw carrying the rifle from Luther Ct. Reid told me that he saw Davila's face under a street light. April Coffield looked at the photospread. She seemed nervous at first. She put her finger on Davila and said she saw him once. Detective

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[28] At trial, the witness explained that his name is Kent Reed.

> Boetcher asked her about Davila. Coffield admitted to Detective Boetcher that she has seen Davila at least a dozen times. *Coffield then said that Davila was the man she saw running with a rifle and that Davila was the man she saw shoot into the apartment where Queshawn and Annette Stevenson were killed.*
>
> Appellant asserted that, during the April 7th recorded interview, Ms. Coffield did not make the specific statements that are underlined in the affidavit. During the pretrial hearing, Detective Johnson explained that Ms. Coffield had, at first, denied seeing appellant's face,[29] but then she gave a complete description of his weight, height, skin color, hair style, and she identified his photograph in the line-up.

The transcript of the recorded interview shows that she told Detective Johnson that she saw a person standing across the street from the Stevenson's house and shooting at the house. Then she identified appellant as the shooter in the subsequent photo line-up. Furthermore, at the time that Ms. Coffield made the photo identification, she gave the detective additional details about appellant that were not part of the initial recorded interview. And the affidavit reflects these

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[29] In fact, during the recorded interview, Coffield said, at one point, that she never saw the shooter's face on the night in question. But the single most distinctive aspect of appellant's appearance are the remarkably large shiny earrings he wore and the large silver-colored bolts through his ear. These earrings and bolts are prominently obvious in appellant's photograph that both Kent Reed and Ms. Coffield identified as being the shooter. Appellant may be identified more by his ears than his face.

added statements were made at the time that she made the photo identification, not at the time of the recorded interview.

Although Ms. Coffield said that she did not see the rifle as the shooter walked through the field, she did tell the detective that she had seen a "red beam" following him, and other witnesses had already described the semi-automatic rifle with the "red dot." Appellant also claims that Ms. Coffield never said that she "peeked" out of the house that she ran into after hearing the initial shots. Indeed, she never used the word "peek" during the initial interview, but she did say that, after the first burst of gunfire, she ran inside her cousin's house, and then, when she thought the shooting "was over and done with – I started going toward the [Stevenson's] house and then seen him standing at the house and he started shooting again."

In sum, Detective Johnson explained the perceived inconsistencies and discrepancies between the details Ms. Coffield gave him during their initial interview and those that she made at the second interview when she identified appellant's photograph. There is no evidence that Detective Johnson knowingly, intentionally, or with reckless disregard for the truth, made false or misleading assertions in his affidavit. The trial judge could reasonably believe that any inconsistencies were the result of negligence or innocent mistake by Detective Johnson. Furthermore, these discrepancies are minor and not material to the existence of probable cause set out in the affidavit. The trial judge did not abuse her discretion in denying appellant's

motion because he had not proven, by a preponderance of the evidence, that Detective Johnson inserted false or misleading information in his affidavit.[30]

Finally, several days after the evidentiary hearing, the trial judge stated an alternative basis for her original ruling denying appellant's motion to suppress. She found that, even if all of Ms. Coffield's statements were omitted from the affidavit, the magistrate still had probable cause to issue the arrest warrant. She explained, "I know the State didn't specifically argue if you excise it, it's still sufficient, but that was the analysis I went through." We agree. Even if all of the information supplied by April Coffield is excised from the affidavit, the remaining information suffices to establish probable cause to believe that appellant was the person who shot and killed Annette Stevenson and her granddaughter. This alternate finding also satisfies *Franks*.[31] We overrule appellant's third, fourth, fifth, and sixth points of error.

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[30] *See Franks*, 438 U.S. at 156; *United States v. Kattaria*, 553 F.3d 1171, 1177 (8th Cir.) (en banc) (per curiam) ("We review the denial of a *Franks* hearing for abuse of discretion."), *cert. denied*, 558 U.S. ___ (2009).

[31] *See Franks*, 438 U.S. at 155-56 (if purportedly false statements are set aside, the remainder of the affidavit must be insufficient to establish probable cause before the warrant may be held invalid); *Ramsey v. State*, 579 S.W.2d 920, 922-23 (Tex.Crim.App.1979) (before warrant may be held invalid, defendant must "[s]how that when the portion of the affidavit alleged to be false is excised from the affidavit, the remaining content is insufficient to support issuance of the warrant.").

The Voluntariness of Appellant's Written Statements

In his seventh, eighth, ninth, and tenth points of error, appellant claims that the trial judge erred in overruling his motion to suppress his four written statements stemming from custodial interrogation. He argues that his statements were involuntarily made because he did not eat, drink, or go to the bathroom for almost seven hours during his interview with Detective Johnson. He argues that he was deprived of these basic needs and therefore any statements he made were unconstitutionally coerced.[32] He states, "Though Detective Johnson testified that Appellant made no specific requests for anything, Appellant contends that it [is] ridiculous to believe that anybody would be in a position to give four voluntary written statements without receiving some food or water and without needing to use the restroom."

Detective Johnson testified that appellant was arrested and brought to the police station at about 1:40 p.m. on April 8th. Detectives Johnson and Boetcher met with him in an interview room where appellant's handcuffs were removed and he was placed in leg cuffs. He began the interview by asking appellant if he wanted "anything to eat or drink or anything like that. He said no. I do it that way every time. And then I advised him of his *Miranda* rights." Appellant told

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[32] Appellant relies upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article I, § 10 of the Texas Constitution, and Article 38.22 of the Texas Code of Criminal Procedure.

Detective Johnson that he understood his rights and that "he freely, intelligently and voluntarily waive[d] those rights" and agreed to talk with the officers. "He was very relaxed. Just sat there kind of casual." Appellant gave his first statement beginning at 4:00 p.m. and ended it at 4:25. He gave the second statement beginning at 6:47 p.m. and completed it at 7:22. The officers began taking the third statement at 7:38 p.m. and concluded it at 8:12.[33] Detective Johnson said that he did not do anything to deny appellant his basic needs, did not prevent him from having liquids or food, and did not prevent him from going to the restroom. He took a picture of appellant lounging casually in his chair in the interview room. Appellant does not appear to be under any stress or duress.

On cross-examination, Detective Johnson again said that appellant appeared very relaxed; "[t]he whole thing was extremely friendly." Appellant "never asked to go to the bathroom"; he never asked for fluids or food. Detective Johnson reiterated that he had offered, but appellant turned him down.

Detective Boetcher also testified and said that appellant gave his fourth statement beginning at 8:45 p.m. and completed it at 9:06. He said that appellant had used the restroom, but he did not specify when.

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[33] This third statement is the one in which appellant admitted his guilt and explained his actions. Detective Johnson was not present when Detective Boetcher took the fourth statement concerning the extraneous murder.

The trial judge entered oral findings into the record and stated, inter alia,

> [Appellant] was offered nothing in exchange for these three statements. There was no force, threats, or coercion made by the police. He was lucid. Did not appear intoxicated. Never asked for a – food or for anything to drink.
>
> The court finds that the statements are freely and voluntarily made and are admissible.

Appellant argues, without citation to any authority, that it is simply "ridiculous" to think that a person could give four voluntary statements if he had not had food, water, or use of the restroom for seven hours, even though he had never asked for those amenities.

The warnings required by *Miranda* were established to safeguard an uncounseled person's constitutional privilege against self-incrimination during custodial interrogation.[34] The warnings required by article 38.22 are virtually identical to the *Miranda* warnings and are required to be given only when there is custodial interrogation.[35] The determination of whether a statement stemming from custodial interrogation is voluntary is based upon an examination of the totality of the circumstances surrounding its acquisition.[36] Additionally, great deference is accorded to the

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[34] *Herrera v. State*, 241 S.W.3d 520, 525 (Tex.Crim.App.2007).

[35] *Id.* at 526.

[36] *Id.* at 525; *Penry v. State*, 903 S.W.2d 715, 744 (Tex.Crim.App.1995).

trial judge's findings of facts concerning the voluntariness of a suspect's statement[37] and to her decision to admit or exclude such evidence, which will be overturned on appeal only where "a flagrant abuse of discretion is shown."[38]

Relevant factors to consider when determining whether a confession is coerced include, but are not limited to, whether the defendant received *Miranda* warnings; the defendant's age, intelligence level, education, and mental state; the conditions under which the defendant was interrogated (i.e., duration, environment and access to restroom facilities and food); and whether the defendant was physically punished.[39] A custodial interview lasting seven or more hours is not, by itself, unconstitutionally coercive.[40] Nor is the fact

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[37] *See Green v. State*, 934 S.W.2d 92, 98-99 (Tex.Crim.App.1996) (stating that, in the context of determining the voluntariness of a confession, the trial court is the sole fact finder and may elect to "believe or disbelieve any or all" of the evidence presented at a hearing on a motion to suppress); *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex.Crim.App.1995) (at a hearing on a motion to suppress a confession, "the trial court is the sole judge of the weight and credibility of the evidence").

[38] *Delao v. State*, 235 S.W.3d 235, 238-39 (Tex.Crim.App.2007).

[39] *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

[40] *See, e.g., Clark v. Murphy*, 331 F.3d 1062, 1073 (9th Cir.2003) (confession not coerced when evidence showed that defendant was detained in a small interview room for about eight hours and did not ask for food or water or ask to use bathroom facilities); *Jenner v. Smith*, 982 F.2d 329, 334 (8th Cir.1993) ("The fact that the questioning extended for six or seven hours is not per se unconstitutionally coercive."); *Sumpter v. Nix*, 863 F.2d 563, 565 (8th Cir.1988) ("The seven and one-half hour interrogation,

that the suspect was not given food, drink, or use of the bathroom, absent a request to do so. In the present case, Detective Johnson testified that he did offer appellant food and drink, but appellant declined the offer. Detective Boetcher testified that appellant did use the bathroom at some time during the interview. There is no evidence that appellant made any request for food, drink, or use of the bathroom that was denied. Detective Johnson further testified that the rapport between the officers and appellant was "extremely friendly" and that appellant was fully cooperative. The appellant proffers no persuasive argument or authority that his confession was not voluntarily given, and our review of the record reveals no evidence showing that his statement was not voluntary. We conclude that the trial judge did not abuse her discretion in admitting appellant's custodial statements.[41] We therefore overrule appellant's seventh through tenth points of error.

Sumpter's IQ of 89, and the special agent's references to Sumpter's child and wife, even if considered in combination with one another, do not make the confession involuntary."); *cf. Stein v. New York*, 346 U.S. 156, 185-86, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953) (twelve hours of intermittent questioning by different officers over a 32-hour period was not unconstitutionally coercive); *compare Greenwald v. Wisconsin*, 390 U.S. 519, 520-21, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968) (confession involuntary when the suspect, while on medication, was interrogated for over eighteen hours without food, medication, or sleep, and was denied requested counsel).

[41] *See Delao*, 235 S.W.3d at 238-39.

Appellant's Request for A Jury Instruction on Voluntariness

In his eleventh point of error, appellant contends that the trial judge erred in refusing to include an instruction in the jury charge concerning the voluntariness of his three written statements concerning the charged capital offense and the fourth statement concerning the extraneous murder that was introduced at the punishment stage. The sum total of his argument under this point of error is as follows:

> In the case at bar, a hearing was conducted on the voluntariness of Appellant's four statements. As argued in his previous points of error, Appellant was subjected to seven hours of custodial interrogation with no food, water, or access to bathroom facilities. The evidence raised a voluntariness issue and the trial court abused its discretion by not submitting an Art. 38.23 issue to the jury. *See Oursbourn v. State*, 259 S.W.3d 159, 177-78 (Tex.Crim.App.2008), *remanded for harm analysis and rev'd*, 288 S.W.3d 65 (Tex.App. – Houston [1st Dist.] 2009, no pet.).

During the jury charge conference, appellant asked the trial judge to include a written jury charge instruction under Article 38.23 concerning his custodial confessions. However, a defendant's right to the submission of an Article 38.23 jury instruction is limited to instances in which there are affirmatively disputed issues of fact that are material to the claim of a constitutional violation that would make the disputed

evidence inadmissible.[42] To raise a disputed fact issue for purposes of an Article 38.23 instruction, there must be some *affirmative* evidence that puts the existence of that fact into question.[43] For example, if there had been some affirmative evidence in this case that appellant had requested food, drink, or the use of the bathroom but his request was denied, that would suffice to raise a disputed fact (although that disputed fact might not suffice, by itself, to render appellant's confession constitutionally involuntary).[44] In the present case, however, appellant points to no such affirmative evidence

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[42] *Madden v. State*, 242 S.W.3d 504, 509-10 (Tex.Crim.App.2007); *Vasquez v. State*, 225 S.W.3d 541, 545 (Tex.Crim.App.2007) ("If there is no factual issue of how evidence was obtained, there is only an issue of law, which is not for a jury to decide under article 38.23(a).").

[43] *See Oursbourn v. State*, 259 S.W.3d 159, 177 (Tex.Crim.App.2008). In *Oursbourn*, which appellant relies on, we stated:

> A defendant must establish three foundation requirements to trigger an Article 38.23 instruction: (1) the evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested; and (3) the contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the statement claimed to be involuntary. The defendant must offer evidence that, if credited, would create a reasonable doubt as to a specific factual matter essential to the voluntariness of the statement. This factual dispute can be raised only by affirmative evidence, not by mere cross-examination questions or argument.

Id. (footnotes omitted).

[44] *See Madden*, 242 S.W.3d at 510 ("[I]f other facts, not in dispute, are sufficient to support the lawfulness of the challenged conduct, then the disputed fact is not submitted to the jury because it is not material to the ultimate admissibility of

in the record. He did not point to any such evidence at trial either. When the trial judge pointed out that Detective Johnson "admitted that there were – that [appellant] hadn't had anything to eat or drink, but there was no testimony that it went from that to being coercive in any way," appellant's counsel simply stated:

> I think what I'm arguing – what I'm asking you to consider is, inferentially, just on the face of that testimony, in – common day experience that somebody being interrogated for seven hours and they don't request food, drink or water – food, drink or bathroom facilities in front of you for 30 minutes are nervous, tense, and otherwise, and ask for water. It's obvious to me.
>
> In other words, appellant's position, both at trial and on appeal appears to be that a person who does not have food, drink or use of the bathroom for seven hours cannot, as a matter of law, give a voluntary written statement. First, as discussed in his points of error six through ten, this is not the law. Second, if this

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the evidence."); *see also Perry v. State*, 158 S.W.3d 438, 446 (Tex.Crim.App.2004) (defendant not entitled to any jury instruction under art. 38.23(a); evidence of his intoxication and injury "does not raise any constitutional voluntariness issues because this evidence does not involve any police coercion or other official over-reaching."); *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex.Crim.App.1995) (statement involuntary under federal due process "only if there was official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker").

were the law, then appellant would not be entitled to a jury instruction under Article 38.23, because he is relying upon an issue of law, not an issue of disputed fact. And jury instructions are appropriate only when there is a disputed issue of material fact.[45] Therefore, appellant was not entitled to any jury instruction, and his eleventh point of error is without merit.

Miscellaneous Issues

In points of error twelve through fourteen, appellant raises various legal issues concerning the Texas death-penalty scheme and its implementation. We have repeatedly rejected these claims and appellant does not persuade us to overrule our prior cases.

In point of error twelve, appellant argues that the trial court erred in overruling his motion to declare Article 37.071 unconstitutional because Texas law permits a grand jury to indict a person for capital murder without first reviewing the evidence to support the punishment special issues. He relies on *United States v. Robinson*,[46] in which the Fifth Circuit held that a federal indictment charging a defendant with capital murder must allege the aggravating factors that render a defendant eligible for the death penalty in the

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[45] *Madden*, 242 S.W.3d at 510; *see also Oursbourn*, 259 S.W.3d at 177.

[46] 367 F.3d 278 (5th Cir.2004).

indictment.[47] That case, how ever, dealt only with federal indictments in federal prosecutions. The federal constitutional right to indictment in a felony case does not apply to the states.[48] Furthermore, the indictment in this case did allege the aggravating factors that elevated this case from a murder charge under Section 19.02 of the Texas Penal Code to capital murder – a murder that is eligible for imposition of the death penalty – under Section 19.03(a)(7)(A). Any capital-murder charge under Section 19.03 makes a defendant eligible for the death penalty under Article 37.071 if the State seeks the death penalty in the particular case. The elements of capital murder alleged under Section 19.03 suffice to put the defendant on notice that the State may seek the death penalty. No further pleading within the indictment is necessary.[49]

In his thirteenth point of error, appellant argues that the trial court erred in overruling appellant's objection to the so-called "10-12" rule in the Texas death penalty scheme. We have repeatedly considered and rejected this claim.[50]

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[47] *Id.* at 284.

[48] *See Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (the right to a grand-jury indictment has not been extended to the States through the Fourteenth Amendment).

[49] *See Renteria v. State*, 206 S.W.3d 689, 709 (Tex.Crim.App.2006); *see also Crutsinger v. State*, 206 S.W.3d 607, 613 (Tex.Crim.App.2006); *Perry v. State*, 158 S.W.3d 438, 446-48 (Tex.Crim.App.2004); *Hankins v. State*, 132 S.W.3d 380, 387 (Tex.Crim.App.2004); *Resendiz v. State*, 112 S.W.3d 541, 550 (Tex.Crim.App.2003).

[50] *See Coble v. State*, ___ S.W.3d ___, No. AP-76,019, 2010 WL 3984713 at *23 (Tex.Crim.App. Oct.13, 2010); *Williams v. State*,

In his fourteenth point of error, appellant asserts that the trial judge erred in overruling his motion to instruct the jury that the State bears the burden of proof concerning the lack of mitigating evidence. We have repeatedly rejected this argument.[51]

Having reviewed all of appellant's fourteen claims, we find that none of them require reversal of the jury's verdict, and we therefore affirm the trial court's judgment and sentence.

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301 S.W.3d 675, 694 (Tex.Crim.App.2009); *Smith v. State*, 297 S.W.3d 260, 278 (Tex.Crim.App.2009); *Segundo v. State*, 270 S.W.3d 79, 102-03 (Tex.Crim.App.2008); *Russeau v. State*, 171 S.W.3d 871, 886 (Tex.Crim.App.2005).

[51] *See, e.g., Mays v. State*, 318 S.W.3d 368, 397 (Tex.Crim.App.2010) ("This Court has consistently held that, under Texas statute, the State does not bear any burden of proof in the mitigation issue and that the statute setting out that issue and instructions is constitutional."), *citing Whitaker v. State*, 286 S.W.3d 355, 370 (Tex.Crim.App.2009); *Busby v. State*, 253 S.W.3d 661, 667 (Tex.Crim.App.2008).

Texas Court of Criminal Appeals
Case No. Writ No. _____

[C-1-009420-1108359-A]

Trial Court Writ No. _____

(Trial Court Cause No. 1108359D)

IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN

EX PARTE	§	**11.071 HABEAS**
	§	**WRIT**
ERICK DANIEL DAVILA	§	

ORIGINAL 11.071 APPLICATION FOR HABEAS RELIEF FROM A JUDGMENT AND SENTENCE OF DEATH IN CRIMINAL DISTRICT COURT NUMBER ONE FOR TARRANT COUNTY, TEXAS, THE HONORABLE SHAREN WILSON, JUDGE PRESIDING.

An in-court hearing *is* requested.

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ATTORNEY FOR APPLICANT

* * *

GROUNDS PRESENTED

GROUND ONE: MR. DAVILA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PUNISHMENT PHASE OF HIS TRIAL BECAUSE OF THE DEFENSE TEAM'S FAILURE TO CONDUCT A MINIMALLY SUFFICIENT MITIGATION INVESTIGATION.

GROUND TWO: TEXAS' CURRENT DEATH PENALTY SCHEME VIOLATES THE 6TH, 8TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE JURIES ARE GIVEN INSUFFICIENT GUILDANCE [sic] **ON WHAT THE SO-CALLED "FUTURE DANGER" SPECIAL ISSUE REQUIRES THEM TO PREDICT.**

GROUND THREE: BECAUSE THE "FUTURE DANGER" SPECIAL ISSUE SUBMITTED TO TEXAS DEATH PENALTY JURIES IS SO INHERENTLY COMPLEX AND CONVOLUTED, TEXAS' CURRENT DEATH PENALTY SCHEME VIOLATES THE 6TH, 8TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

* * *

Discussion

The Supreme Court established the legal principles governing claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance

claim has two components: First, a petitioner must show that counsel's performance was deficient, and second; that the deficiency prejudiced the defense. *Id.* at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. The Supreme Court has declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* That "objective standard of reasonableness" also applies to punishment stage mitigation investigations in death penalty cases. *Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003).*

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland* at 690-91, 104 S.Ct. 2052.

The Supreme Court's opinion in *Williams v. Taylor* is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, the Court applied *Strickland* and concluded that counsel's failure to uncover and present significant and otherwise mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not "fulfill[ed]their obligation to conduct a thorough investigation of the defendant's background." 529 U.S. 362, at 396, 120 S.Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)). In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of *Strickland.*

In assessing counsels' investigation, the reviewing court must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," *Strickland*, 466 U.S., at 588, 104 S.Ct. 2052, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," *id.*, at 689, 104 S.Ct. 2052 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight"). Despite these norms, however, Mr. Davila's trial mitigation team abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, p. 133 (noting that among

the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religions and cultural influences (emphases added)); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1982) ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing . . . Investigation is essential to fulfillment of these functions").

The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment. Mr. Davila asks this Court to note the myriad of things not learned by defense counsel until after the trial and his sentence of death – things that could have been discovered through reasonable investigation. He incorporates, by reference, the post-conviction mitigation report and attached affidavits in the appendix documents at the end of this Application.

The reviewing court must determine, *de novo*, whether counsel reached beyond the rudimentary records in their investigation of petitioner's background. The record as a whole does not support the conclusion that counsel conducted a more thorough investigation than the one the Supreme Court described in *Wiggins v. Smith* 539 U.S. 510, 123 S.Ct. 2527 (2003).

Evidence about the defendant's background and character is relevant because of the belief, long held by reviewing courts, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse. *See Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71, L.Ed.2d 1 (1982) (noting that consideration of the offender's life history is a "part of the process of inflicting the penalty of death").

In the instant case counsels' exploration of the punishment mitigation question was almost entirely dependent on the investigation conducted by Dr. Emily Fallis, a Fort Worth area psychologist. The role Ms. Fallis played in the defense mitigation "team" required her to identify and then interview potential mitigation witnesses. The crux of Applicant's complaint is that Ms. Fallis' investigation was incomplete and, and fell short of the minimum requirements of the. The mitigation evidence discovered by Mitigation Partners in their post-conviction investigation – evidence of a highly abusive childhood with an extremely dysfunctional family – is overwhelming and, if known by defense counsel at trial, would likely have been presented to and considered by the jury in connection with the mitigation special issue. Because defense counsel's case at punishment was almost entirely reliant on the mitigation investigation conducted by Dr. Fallis, her shortcomings should be deemed so insufficient as to require remand for a new sentencing hearing.

In reversing a defendant's sentence of death in *Ex Parte Gonzales*, 204 S.W.3d 391 (Tex. Crim. App. 2006),

this Court was unequivocal in holding that defense counsel has a duty to make a reasonable investigation in order to make a reasonable decision as to whether and how to make use of the evidence. *Id.* at 396 (ruling that counsel failed in his duty to conduct an adequate mitigation investigation). In other words, counsel's strategic decisions must be made after a reasonable investigation of the potential evidence. The minimally reasonable mitigation investigation required by *Wiggins* was not done in this case, requiring the remedy of reversal remand for another sentencing determination.

* * *

No. 4:13-cv-506

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

ERICK DAVILA,

Petitioner,

v.

RICK THALER,

Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent.

Petition for Writ of Habeas Corpus from a
Capital Murder Conviction in the Criminal
District Court No. 1 of Tarrant County

PETITION FOR WRIT OF HABEAS CORPUS

(Filed May 19, 2014)

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Court-Appointed Attorneys for Petitioner Erick Davila

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE U.S. DISTRICT COURT:

NOW COMES, **ERICK DAVILA**, the Petitioner, and respectfully submits his Petition for Writ of Habeas Corpus, asking the Court to issue a writ ordering his release from the Institutional Division of the Texas Department of Criminal Justice. This application follows his conviction and death sentence in the Criminal District Court No. 1 of Tarrant County, cause number 1108359d, styled *State v. Erick Davila.*

Davila is illegally restrained of his liberty by the Director of the Texas Department of Criminal Justice – Institutional Division, by virtue of a sentence and judgment imposing the penalty of death rendered in cause number 1108359d styled *State v. Erick Davila.* (See, Exhibit "A").

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Petitioner, ERICK DAVILA, certifies that the following listed persons have an interest in the outcome of this case.

These representations are made in order that this court may evaluate possible disqualifications or recusal.

Interested Parties		
Individual	***Address***	***Participation***
	Petitioner	
Mr. Erick Davila	Polunsky Unit	Petitioner
Mr. Seth Kretzer	The Lyric Center 440 Louisiana Street Suite 200 Houston, TX 77002 (713) 775-3050 (direct) (713) 224-2815 (fax)	Appointed attorney for current federal habeas
Mr. Jonathan Landers	Jonathan Landers 2817 W. T.C. Jester Houston, Texas 77018 (713) 301-3153 – (phone) (713) 685-5020 – (fax)	Appointed attorney for current federal habeas
Mr. Robert Ford	**DECEASED**	Trial Counsel

Ms. Joetta Keene	204 S Mesquite St. Arlington, TX 76010	Trial Counsel
Mr. David Richards	David Richards 204 West Central Avenue Ft. Worth, TX 76164 (817) 332-5567 (Phone)	state writ lawyer
Ms. Mary Thornton	3901 Race Street Fort Worth, Texas 76111	State direct appellate lawyer
Interested Parties		
Individual	***Address***	***Participation***
Respondent		
The Hon. Mr. Greg Abbott		Texas Attorney General
Mrs. Katherine Hayes	Office of the Attorney General Capital Litigation Division P.O. Box 12548, Capitol Station Austin, TX 78711-2548 (512) 936-1600 (voice) (512) 320-8132 (fax)	Asst. Attorney General

Judges		
Honorable Sharen Wilson	Tim Curry Justice Center 5th Floor 401 W. Belknap Fort Worth, TX 76196-7213 (817) 884-1551 (Office) (817) 884-1191 (Fax)	Trial and Habeas Judge

DESIGNATION OF ABBREVIATIONS and EXPLANATION OF THE TRIAL RECORD

"RR" refers to the reporter's record from the state trial court. "CR" refers to the clerk's record from state trial court. # Writ RR refers to the specific volume of the state writ hearing reports record. Writ CR refers to the state writ clerk's record.

STATEMENT OF JURISDICTION

This petition is submitted pursuant to 28 U.S.C. § 2254 et. seq., and amendments four, five, six, eight, and fourteen, of the United States Constitution, and section nine, clause two of the United States Constitution (habeas corpus).

DAVILA'S AEDPA DEADLINE WAS SATISFIED

Davila was convicted of capital murder in February of 2009. He filed a direct appeal in the Texas Court of Criminal Appeals, which affirmed the conviction and sentence on January 26, 2011. *Davila v. State*, AP-76, 105, 2011 WL 303265 (Tex. Crim. App. Jan. 26, 2011), *cert. denied*, 132 S. Ct. 258, 181 L. Ed. 2d 150 (U.S. 2011). He filed a petition for writ of certiorari to the Supreme Court, which it denied on October 3, 2011. *Davila v. Texas*, 132 S. Ct. 258, 181 L. Ed. 2d 150 (2011). Thus, his conviction became final for the purposes of his federal writ on October 3, 2011. *See, e.g.*, *Giesberg v. Cockrell*, 288 F.3d 268, 270 (5th Cir. 2002); *Crutcher v. Cockrell*, 301 F.3d 656 (5th Cir. 2002).

"The time during which a properly filed application for State post-conviction . . . claim is pending shall not be counted toward any period of limitation." 28 U.S.C. § 2244(d)(2). Davila filed his state writ on August 29, 2011, before the Supreme Court denied his petition for certiorari. The Court of Criminal Appeals denied his writ on April 17, 2013. *Ex Parte Davila*, WR-75, 356-01, 2013 WL 1655549 (Tex. Crim. App. Apr. 17, 2013). Davila's federal habeas clock began to tick on this date; and his initial writ had to be filed by Thursday, April 17, 2014. Davila filed his initial writ on April 14, 2014. *See* Doc. no. 16, Petition for Writ of Habeas Corpus.

However, this Court has entered an order allowing Davila to amend his writ with a version to be filed in May. This is the amended version.

EXHAUSTION

Davila asserts that most of the federal constitutional claims alleged herein have been exhausted in proceedings before the Texas courts.[1] The exceptions are *Trevino* claims alleging that the state writ lawyer, David Richards, rendered ineffective assistance at the state writ level, and a related claim that appellate counsel Mary Thornton was ineffective by failing to raise the strongest appellate point of error in Davila's case. As explained below, these claims are not defaulted because Ineffective Assistance of Counsel at the state appeal and collateral review levels constitute cause and prejudice to excuse any default.

PROCEDURAL HISTORY

A. Procedural History in State Court

In the superseding indictment filed June 18, 2008, Erick Davila was charged with the offense of capital murder (two murders during the same criminal transaction). Tex. Penal Code § 19.03(7)(A). 1 CR 1-3. On February 10, 2009, Davila pleaded not guilty before a jury. 14 RR 9-10. Nine days later, on February 19, 2009, after hearing evidence from the State and the defense, the jury found Davila guilty of capital murder. 9 CR

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[1] The burden is on Respondents to demonstrate that Davila failed to exhaust a particular claim. *See, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Esslinger v. Davis*, 44 F.3d 1515, 1528 (11th Cir. 1995); *Herbst v. Scott*, 42 F.3d 902, 905 (5th Cir. 1995); *English v. United States*, 42 F.3d 473, 477 (9th Cir. 1994); *Brown v. Maass*, 11 F.3d 914, 914-15 (9th Cir. 1993); *Harmon v. Ryan*, 959 F.2d 1457, 1461 (9th Cir. 1992).

1947-49; 20 RR 55. After hearing additional testimony from witnesses called by both sides, the jury answered Special Issue Number One (whether there is a reasonable probability that Davila would commit criminal acts of violence that would constitute a continuing threat to society) "yes" and Special Issue Number Two (whether there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment) "no." 9 CR 1947-49; 26 RR 5-7. Accordingly, the trial court sentenced Davila to death by lethal injection on February 27, 2009. 9 CR 1947-49; 26 RR 7-8. *See* Tex. Code Crim. Proc. Art. 37.071 § 2(g). On March 2, 2009, Davila's conviction and sentence of death were automatically appealed to the Texas Court of Criminal Appeals. 9 CR 1952.

B. Procedural History in Federal Court

On June 21, 2013, the state habeas lawyer filed a motion for appointment of federal writ counsel. Doc. No. 1. In July of 2013, this Court appointed Seth Kretzer and Jonathan Landers. Doc. No. 4. On March 19, 2014, this Court granted Davila permission to amend his writ within one month of filing a writ meeting the AEDPA deadline. Doc. No. 9. Each claim filed in this amended writ was included in the initial writ which was timely filed. *See* Doc. no. 16, Petition for Writ of Habeas Corpus.

STATEMENT OF FACTS

On April 7, 2008, Erick Davila shot at a gang rival named Jerry Stevenson. Unfortunately, a grandmother and a little girl died who happened to be near Stevenson but whom Davila did not know and had no animus towards.

I. Guilt and innocence, a question of intent, and an improper jury charge.

In Texas, a person can be found guilty of capital murder for intentionally killing more than one person during the same criminal transaction. Tex. Penal Code § 19.03. Importantly, one must have the specific intent to murder at least two people to be guilty of this offense; it is not enough that a person attempted to murder a single person, and accidently killed two. *See Roberts v. State*, 273 S.W.3d 322, 330 (Tex. Crim. App. 2008).

Davila's defense counsel argued from the start that the most important issue for the jury would be intent. 14 RR 16. Specifically, in their opening statement, defense counsel asked the jury to pay close attention to whether or not "Erick had the specific intent to kill these two folks, intentionally or knowingly." *Id.* at 17. The defense theme continued through closing, when defense counsel once again argued that Erick was attempting to shoot only Jerry Stevenson, with whom he'd had previous confrontations, rather than anyone else. *See, e.g.*, 20 RR 22.

A. The shooting

On April 6, 2008, 47-year-old Annette Stevenson hosted a birthday party for her granddaughter Nautica, at her residence in Village Creek Apartments, located at 5701 Anderson Street in Fort Worth, Texas. 14 RR 19-21; 15 RR 42-44. Nautica's sister, Cashmonae, their two brothers, and several of their young cousins and friends attended the party. 14 RR 20-22; 15 RR 40, 43-44. Annette's son, Jerry Stevenson, his five-year-old daughter, Queshawn, and his three-year-old son were in attendance. 14 RR 21, 24; 15 RR 44, 48, 54-55. Also present were Jerry's sister Tamesha, the mother of Nautica and Cashmonae, and his sister Talisha; these siblings and their children all resided with Annette. 14 RR 19-20; 15 RR 41, 44. Jerry Stevenson (a.k.a. Dunna, or Big Boy Dooney) was the only adult male at the house. 15 RR 42-43.

The scene of shooting was in a part of Fort Worth known at the time as "Blood" territory. *See, e.g.*, 14 RR 189. It was also undisputed that that Erick Davila was a member of the Truman Street Bloods gang. 16 RR 54-64. Jerry Stevenson testified that he was not a gang member, but that he hung around many gang members. 15 RR 92-95. Specifically, he had friends who were Polywood Crips, but he denied being a Crip himself. *Id.* at 72. Stevenson also recognized that the house where he lived (the same house where the shooting took place), was probably identified as a Crip house. *Id.* at 92-95. He further acknowledged that it could lead to problems when Crips and Bloods lived in the same area of town. *Id.*

Indeed, there had been trouble just a few weeks before the shooting. Jerry, little Garry (Jerry's nephew), and Jeremy (Jerry's brother) were at Jerry's mother's house. *Id.* at 73. All of the men were in their 20s. *Id.* at 74. Two other men were also present at the house; they had been in an altercation with little Garry. *Id.* at 75. At one point, one of the two other men had threatened to shoot him. *Id.* at 75. Jerry intervened in the argument and separated the parties. *Id.* at 75-76. Jerry recognized one of the two men arguing with his cousin as "Mike-Mike," but he did not recognize the other person (and did not believe Davila was present at the argument). *Id.* at 76-77. However, a security guard working at the townhomes where the altercation took place, Mrs. Stephen-Mosley (affectionately known as Pookie), did recognize Davila as one of the men arguing with Stevenson. 19 RR 77-78. Stevenson also admitted that the men he was arguing with were associated with the Bloods gang. 15 RR 76-77.

Unlike Jerry Stevenson, Detective Johnson of the Fort Worth Police Department did have information that Crips lived at 5701 Anderson; he also thought the shooter was possibly a Blood. 17 RR 280.

Ms. Stephens-Mosley testified in detail about the argument that took place at 5701 Anderson in the weeks before the shooting. Ms. Stephens-Mosley, the security officer who worked for the apartment complex, recalled the incident as taking place on March 13th. 19 RR 62. She remembered being called to 5701 Anderson and finding six gentlemen in a conversation, and two of those gentlemen were Garry and Dunna (a.k.a.

Dooney, or Jerry Stevenson). *Id.* at 63. Ms. Stephens-Mosley recalled two men being on one side of the conversation and four being on the other; she recalled a really intense conversation. *Id.* at 64-65. She asked the parties to leave the complex. *Id.* at 65-67. Ms. Stephens-Mosley was concerned somebody would get a gun. *Id.* at 69. Importantly, Ms. Stephens-Mosley specifically remembered that Erick Davila was one of the people arguing with Jerry Stevenson, and according to her, Stevenson told her that Erick or his companion had pulled a gun during the argument. *Id.* at 69-70.

On the evening of April 6, there was another birthday party going on at the apartment complex. 14 RR 55, 122-23, 241. Yvonne Watts, who lived one street over on Luther Court, also in the Village Creek Apartments, held the party for her daughter. 14 RR 241. Kent Reed, his wife Arlette Keys, her 15-year-old brother Eghosa Ogierumwense, and Arlette's mother, Charlene Ogierumwense, along with several other teenagers and children, celebrated inside and outside the Watts' residence. 14 RR 55, 59-60, 122-23, 126, 240-42.

At approximately 7:30 p.m., Kent, Arlette, and Eghosa saw a black Mazda 626 automobile with dark tinted windows, custom vents, and racing wheels drive up and abruptly park on Luther Court. 14 RR 61, 68-69, 123-25, 242-43; 16 RR 53-56. All three watched as Davila exited from the vehicle with a rifle equipped with a red laser sight. 14 RR 61-65, 127-28, 242-44; 16 RR 71-72, 110-11, 123-31; 18 RR 140-42. Immediately after Davila exited the car, another individual moved

into the driver's seat and sped away (this person was Garfield Willis Thompson, whose capital murder charge was ultimately dismissed when he plead to a different aggravated robbery). 14 RR 61, 140. As he toted the weapon at his side, Davila walked past Kent and Eghosa toward the home of a woman known as "Miss Sheila." 14 RR 63, 76, 130-31, 246. When no one responded to his knock, Davila proceeded in the direction of the Stevenson party. 14 RR 66, 131-40, 246.

Eghosa followed Davila. *Id.* at 132-34. Eghosa testified that he watched Davila stop at the corner of house across the street from 5701 Anderson. *Id.* at 134-136. There were kids outside of the house, Granny (Annette Stevenson) was on the porch, and Dooney (Jerry Stevenson) was outside. *Id.* at 136-37. Eghosa initially saw the red beam from the rifle shinning on Dooney, at which point Dooney turned around and went into the house. *Id.* at 138. Then Davila started shooting the gun. *Id.* There were women and children outside when Davila started shooting, but Eghosa never saw the beam on any of them. *Id.* Davila then ran to the middle of the street, shot again, and jumped in a car and drove off. *Id.* at 140-141. On cross examination, Eghosa explained that after Dooney walked into the house, the shooter started shooting at the house. *Id.* at 157. Shots were going everywhere. *Id.*

Eghosa, along with many other people, ran inside the Stevenson residence. 14 RR 26, 142. Arlette, a registered nurse, also went inside to offer her assistance. *Id.* at 80-82, 248-49. Annette and Queshawn Stevenson had both been fatally shot. 14 RR 142-43; 18 RR

265-78. Cashmonae, Nautica, Brianna Scott, and Sheila Moblin all suffered non life-threatening injuries. 14 RR 26-28; 15 RR 257, 259.

B. Davila's Clinically Bad Eyesight

Davila was not wearing glasses at the time of the shooting. 14 RR 120. His girlfriend explained that he did not have glasses at the time of shooting, but that he needed them to see. 16 RR 97. Davila presented testimony from an optometrist who evaluated him after the shooting, and he confirmed Davila's poor eyesight. 19 RR 91-92, 97-99. Specifically, the prescription for Davila's right eye was 20/140, and 20/80 for the left eye. *Id.* Pictures were taken from 40 feet to show the jury the effects of such poor eyesight. *Id.* at 93-94, 100-101; Defense Ex. 101, 100. The shooting had taken place at distances of 84 feet and nearly 100 feet from the house. 15 RR 152, 19 RR 124.

C. Jury seized on "intent" argument, but was given an improper jury charge which impeded their ability to give Davila relief

After the close of evidence in the guilt and innocence phase, the court held the customary charge conference with the parties. 19 RR 137-159. All agreed that Davila was entitled to an instruction for the lesser included charge of murder. *Id.* at 141-43. The court instructed the jury on the lesser included offenses of murder for both Queshawn Stevenson and Annette Stevenson. *CR* at 1923-29. The defense also requested

a manslaughter charge, which was given over an objection from the state. 19 RR 147-48; CR at 1923-1929.

Quite strikingly, the state never requested a transferred intent instruction as allowed by Texas Penal Code § 6.04. 19 RR 137-159. As there was no transferred intent instruction, the jury was given the following instruction related to capital murder:

> Now, If you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, In Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did Intentionally or knowingly cause the death of an Individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

CR at 1924. The charge was given to the jury at the beginning of the day on February 19, 2009.

In the middle of the afternoon, after the jury had been deliberating for four hours, the jury sent the following note to the judge: "In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others." *Id.* at 1931. The judge responded with an incorrect instruction, which did not clarify that Davila

must have intended to kill two distinct people before he could be convicted of a capital murder:

The Court gives the additional charge on the law as follows:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, harmed, or otherwise affected.

CR at 1933. The defense objected to this charge, but the objection was overruled. 20 RR 53.

After receiving the incorrect charge, the jury quickly returned a guilty verdict for capital murder. CR at 1934.

Shockingly, Davila's direct appellate counsel failed to raise this incorrect jury charge argument on direct appeal.[1]

D. Evidence adduced at the punishment phase

During the penalty phase, the state presented evidence of Davila's prior crimes and an attempted jail

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[1] That appellate counsel raised the sufficiency argument shows she knew of the specific intent required for capital murder as charged in Davila's case. With that in mind, it is amazing she did not raise the jury charge error claim, especially where the jury charge was objected to by trial counsel.

escape while Davila was awaiting trial. The state admitted evidence of an armed robbery that, according to the victims, Davila had participated in. 20 RR 58-108. The state also introduced evidence of another shooting which had taken place shortly before the shooting at the birthday party. 21 RR 19-20, 68-92. Essentially, the testimony was that Davila shot a crack dealer named Tricky, or Lamont, prior to the shooting on Anderson. *Id.* at 68-92. Davila gave a confession for this shooting, his fourth confession in eight hours, claiming he had been threatened at gunpoint by the deceased earlier in the day. *See* State's Ex. 237. A pair of Arlington Police Officers also testified about a time when they stopped Davila for a traffic offense, and found him to have a fully loaded 9 mm handgun in the car. 22 RR 31-59. He had been rude to the arresting officers during the arrest. *Id.* One jailer explained that Davila had been disruptive and refused to get off a phone call while locked up in the Tarrant County Jail. *Id.* at 100-109. Finally, the state presented extensive evidence showing that Davila had been involved in an attempted escape from the Tarrant County Jail while awaiting trial. *See, e.g.*, *Id.* at 154-198. Two guards were beaten badly during the escape attempt. *Id.*

The defense called Davila's father, Mario Davila, to testify. 23 RR 219. He was serving the nineteenth year of 20-year sentence for murder. *Id.* at 220. Mario explained that he was 28 years old when he met Erick's mother, Sheila, and she was only 13 when she became pregnant with Erick. *Id.* at 230. Erick was born when she was 14 years old. *Id.* at 230-31. He explained that

he had been in prison for almost all of his children's lives. *Id.* at 230-240. He drank a lot, and the duty to raise the kids fell on Sheila, Erick's teenage mom. *Id.* On cross-examination, Mario explained that he and Sheila were good parents. *Id.* at 249-51.

Erick's sister, Emily, was called to testify the following day. 24 RR 11. Emily explained that her mother had kicked her out of the house at 16, and she had been taken in by her future mother in law. *Id.* Emily further explained that she and Erick had found out that their stepdad, Santos, was not their biological father when they were 13. *Id.* at 20-30. She explained Erick had been kicked out of the house when he was 15 years old, and that he was dating a lady in her mid 30s at that time. *Id.* She explained that she and her mom had been in physical fights before, and that she disagreed with her mom's treatment of her younger sisters. *Id.* Finally, she explained that the area they were from was full of gangs and violence. *Id.* at 31-42.

Erick's mother, Sheila Olivas, also testified. *Id.* at 48. She explained that she had seven children and that Erick was the oldest and only boy. *Id.* at 50. She claimed to have been sold to Mario, and additionally claimed that Mario had raped her. *Id.* She was a virgin when she was sold to Mario. *Id.* 53-54. She explained that she was poor when she was teenage mother, and that her sister would help to support her. *Id.* 60-70. She explained that Erick had never seen his dad before and that he had grown up around domestic violence. *Id.*

According to Sheila, Eric had been diagnosed with ADHD and had bad eyesight, but she did not like him to take any Ritalin because it made him like a zombie. *Id.* at 69-70. She claimed that she never knew her son was involved in gangs. *Id.* 71-72. She said that she thought she was an overprotective mother. *Id.* 78-79. She admitted, however, that she never went to see her son in jail until six months after his arrest. *Id.* at 89-90. She claimed that she was attempting to find out who his attorneys were and had no idea they had been looking for her. *Id.* at 90-91. She explained that she was simply too busy to meet with the attorneys because she was starting her own church, but she had agreed to meet the trial attorneys for 30 minutes at Starbucks. *Id.* at 89-94. The reason she did not return calls was that her phone was messed up, but she did confirm she got the text from trial attorney Keene explaining she would be arrested if she did not show up for court and testify. *Id.* at 91-94.

On cross-examination, Sheila claimed that she did everything she could for her kids. *Id.* at 97. She believed Erick had done well in school (as opposed to failing most of his classes). *Id.* at 96. She said that she was overprotective and kept her children in her line of vision to make sure they were safe. *Id.* at 97. She knew that all of the problems her son had in school came from the fact "you had to touch him for him to focus." *Id.* at 99. She thought that Erick had the potential to be a super bright student, but his problem was that he was seeking attention. *Id.* at 100. Sheila explained the reason she kicked her daughter out of the house at age

16 was to make sure she was protected. *Id.* at 104. She kicked Erick out for the same reason. *Id.*

Sheila's sister, Deborah Jones, testified that Sheila got pregnant while she was young, and that Erick had come to live with her when he was 14 because Sheila thought it could help him get away from gangs. *Id.* at 111-124. Angela Jones, another sister of Sheila's, also testified for the defense, but she did not add much additional evidence. *Id.* at 134-154.

The main defense mitigation witness was Dr. Emily Fallis. *Id.* at 184-261; 25 RR 41. She was hired to do the social history of Erick. 24 RR 184. She explained that although Sheila was only 13 years old when Erick was conceived, and 14 when he was born, the birth was normal. *Id.* at 190-91. He had met the development milestones one would expect for a healthy child. *Id.* However, he had behavior problems in the first grade and the school he was attending threatened to expel him. *Id.* at 191-92. Dr. Fallis explained that Sheila had lied to her about Erick playing sports as a kid, and not having problems in school. *Id.* at 193-200. Erick struggled in school, made poor grades, and had borderline IQ scores. *Id.* at 200-210. She explained that during his prior prison stay, Erick did not have any serious discipline problems. *Id.* at 219.

It was Dr. Fallis' belief that Sheila neglected her children's education by not making Erick wear glasses or take his ADHD medicine. *Id.* at 231-32. Essentially, Fallis testified that Erick was put in a disadvantageous position from the start.

The main theme of the mitigation case was that Davila's teenage mom neglected him by failing to make him take his medicine and not making him wear glasses.

E. The state writ proceedings were contaminated with IAC *ab initio*

Erick's state writ started with a whimper, as the state writ attorney, David Richards, allowed the deadline for filing the writ to pass without filing a writ or an extension. Writ CR at 358-60. Luckily, the Court of Criminal Appeals allowed Richards an additional 180 days from March 2, 2011, to file the writ. *Id.* at 361-62. Richards filed the 18-page state writ on August 29, 2011, and attached to it a mitigation report compiled by Mitigation Investigator Toni Knox. Mrs. Knox had identified many potential witnesses who would have testified at Davila's trial had they been asked to, but because none of the witnesses were called to testify at the state writ hearing, it appears the judge discounted their potential testimony. Writ CR at 334, 339.

The state trial court held a hearing on the *Wiggins* ineffective assistance of counsel claim raised by Richards. The writ hearing was held on July 2, 2012. *See* 2 Writ RR 1. According to a recently obtained affidavit from the mitigation investigator Toni Knox, Richards did not contact her concerning the hearing until late June 2012. *See* Exhibit "B", Affidavit of Knox. When they spoke on the phone on June 24, Richards did not have a copy of her report (which had been attached to

the writ he filed.) *Id.* Knox did not feel Richards was prepared for the hearing. *Id.* at 2.

The first time that Knox met with Richards in preparation for the hearing was on the date of the hearing. *Id.* They met for one hour, much of which was spent with Knox speaking with the prosecutors and Richards ordering lunch. *Id.* Knox believed that Richards was not familiar with her report, and that he made no effort to call any of the potential mitigation witnesses she had discovered as part of her investigation. *Id.* Finally, Knox believed that Richards had been having health issues around the time he was working on Davila's writ, and that his physical impairment diminished his ability to represent Davila. *Id.*

Davila asserts that Richards was ineffective in both the way he presented the *Wiggins* claim, and by not raising other clearly meritorious claims.

F. Mitigation Specialist Toni Knox uncovers powerful undiscovered mitigation evidence

Thankfully, the state writ attorney did request funds for a mitigation investigator. Writ CR at 355. The motion for funds was granted on July 6, 2009. Additional funding for the mitigation investigator was granted on July 20, 2011. *Id.* at 366. The mitigation specialist, Toni Knox, uncovered valuable mitigation evidence that was not presented to the jury at punishment, including:

- Rosa Nash Jones, Erick's step-grandmother, and Sheila's step-mother, explained that Sheila had always been a trouble maker, even going so far as to fist fight her step-mother at the age of 12. Writ CR at 147. Instead of being sold as a virgin to Mario Davila, Sheila was already sexually active and had been sneaking out of her house and engaging in sexual relations prior to her relationship with Mario (meaning that Sheila lied to her teenage son, Erick, concerning his being conceived by rape). *Id.* Sheila would lie and steal frequently. *Id.* at 148. **Sheila "would beat the tar out of [Erick and Emily] and they were punished harshly for any little thing they did."** *Id.* at 148. Erick and Emily were forced to stand in the corner for hours. Sheila would go out and party for days at a time, leaving her kids with her dad while she was gone. *Id.* Erick was malnourished as a kid; his granddad once noticed his "stomach sticking out just like the starving kids Floyd saw on television. His arms and legs were very thin and he was not very responsive." *Id.* After Erick moved in with his grandparents his stomach stopped swelling and he became more responsive. *Id.* at 149. Sheila never showed Erick or Emily any love. *Id.* Rather than let Erick and Emily play with other children, Sheila made Erick and Emily stay inside and clean the house. Sheila would sometimes lock Erick and Emily in the closet for hours. *Id.* "It was like Sheila wanted them to suffer and wanted to punish them for some

reason. *Id.* at 150. **Rosa was never contacted by anyone from the defense team.** *Id.*

- Sandra Kay Vargas is the daughter of Rosa Carter Nash. She confirmed that Sheila was a wild teenager, who would sneak out of the house to see boys and who would fight with her mother. *Id.* at 150. When Erick was a boy he did not have enough food to eat, and Sandra actually witnessed several occasions where Sheila was extremely abusive to Erick. Once, when Erick was four or five, Erick spilled some of his breakfast causing Sheila to jerk "him off the floor by the arm" and beat him "in the back with her fist." *Id.* Sandra confirmed that Erick and Emily were forced to stand in the corner for hours with their heads against the wall and also forced to stay in the closet for hours. *Id.* at 151. When Erick was 12 his mother kicked him out of the house, Sandra found Erick living on the streets. By the time he was 15 Erick was tough as nails and had a dead look in his eyes. *Id.* Sheila would not let Sandra take Erick and Emily because she was collecting welfare money she did not want to give up. *Id.* **Sandra was never contacted by anyone from Erick's defense team.** *Id.* at 152.

- Ethel Fay Jones is Sheila Jones's older sister. She confirmed that Sheila pursued Mario, and that she would sneak out of the house to spend time with him. *Id.* at 155-56. She was already sexually active when she began seeing Mario. *Id.* at 156. Indeed, Sheila's father

had no idea that she was sexually active until she became pregnant. Sheila was lying about being sold to Mario. *Id.* After Sheila met Santos and they began living together Erick and Emily were treated like outcast. *Id.* at 157. Ethel also recalled arguing with Sheila about her treatment of Erick and Emily. She remembered them being forced to stand in the corner all day. *Id.* They were only permitted to move to use the bathroom. Ethel remembered seeing **"permanent stains where Erick had cried on the wall and marks where his forehead had been pressed against the wall for so many hours."** *Id.* at 157. She would also slap and belittle Erick and Emily, although she would not do this to her other children. Sheila took her children out of school because she is lazy and wants them to do what she wants done, this is necessary because "God told her He does not want her to work." *Id.* at 158. Ethel once watched Sheila slapping Erick and kick him off the porch, he landed on his head. *Id.* Once she was talking with Erick and Sheila came up and slapped him for no reason. *Id.* at 159. At one point, **Sheila told Emily "I could have killed you two a long time ago"** and they were not sure what she meant by that, if she meant have them aborted or actually killed them. *Id.* at 158.

- Linda Jones Mireles is Erick's cousin and Sheila's niece. She once lived with Erick and Emily and saw how Sheila made them constantly clean the house. *Id.* at 163. Sheila would also tell Erick and Emily that she hated them. *Id.* Linda saw the tear streaks on the

wall from Erick and Emily had been standing for so long. *Id.* at 164. Erick felt like the gang was his family, when his mom kicked him out the older gangster took him in. *Id.* Erick's life never included having any fun. *Id.* at 165. **Linda was not contacted by any members of the defense team before Erick's trial.** She would have testified had she been contacted. *Id.*

- Elizabeth Olivas is Santos Olivas sister. Santos was Erick and Emily's step dad. She explained that Sheila acted like a "queen" and made Erick and Emily do all the work around the house. "If Erick or Emily ever complained about the abusive environment, Sheila would harshly punish them with physical violence." *Id.* at 168. She also explained that Sheila was a very violent person. *Id.* **Elizabeth was never contacted by the defense team**, but would have explained the effects Sheila had on her children if given the chance. *Id.* 169.

All of this information was included in various affidavits included in a lengthy report compiled by Investigator Tony Knox for David Richards. *See* Writ CR at 21-174.

Rather than include this information in his writ, and call the witnesses identified by Knox to the state court hearing, state writ counsel simply filed a boilerplate writ and attached Knox's complete report as an exhibit. *See* Writ CR at 2-174.

G. The state trial court adopts the state's findings of facts and conclusions of law.

After the hearing in this case, the trial court adopted the state's proposed findings of fact and conclusions of law verbatim, with the exception of two sentences. *See* Writ CR at 299-352.[2] Below, Davila will explain how the adopted findings of fact and conclusions of law are rife with factual and legal errors.

GENERAL DISCUSSION OF CAPITAL PUNISHMENT LAW IN TEXAS

The following is an overview of capital punishment law in Texas. This summary is provided simply as a general guide; not all capital murder trials follow this pattern.

The Texas Legislature has designated certain types of murders as eligible for the death penalty. To warrant the death penalty, the defendant must have committed another serious crime in addition to committing a murder. For instance, kidnapping and then killing a person is a capital offense. So is killing two people, rather than one, which happened in the present case.

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[2] The trial court's findings of facts and conclusions of law did not include proposed factual finding 75 or proposed legal conclusion 10, other than those two sentences, the states entire proposed findings of fact and conclusions of law was adopted by the trial court. *See* Writ CR at 308, 311,338, 342.

In recent years, once a person is indicted for capital murder and the State decides to pursue the death penalty, the defendant is assigned two attorneys. One of the lawyers is the lead attorney; the other is the second chair attorney. Both attorneys are charged with investigating the case, filing motions, selecting the jury, and arguing as forcefully as possible for a not guilty verdict or a lesser conviction than capital murder, or if all else fails, for a life sentence.

The district attorney's office will equally prepare, usually assigning two, sometimes three, prosecutors to the case, along with one or two investigators and paralegals.

Lawyers for the defendant will usually file a large number of pretrial motions. The reason for this is because the state and federal law requires all issues raised on appeal to be first presented to the trial judge. Death penalty jurisprudence is thick with constitutional and statutory issues. All unsettled challenges to death penalty procedures must be raised. Failing to raise an issue means that it is waived on direct appeal. Moreover, because the Supreme Court has insisted that effective assistance of counsel requires attorneys who are knowledgeable about death penalty litigation, the failure of trial lawyers to raise important issues at trial for later review on appeal can lead accusations that the trial lawyers were ineffective.

In a capital case, the trial judge will hold several pretrial hearings on motions by the State and defense.

The judge will address motions to suppress, constitutional challenges, and hearings on the qualifications of experts. Any defense requests denied by the judge are preserved for appeal.

Texas adheres to individual voir dire of potential jurors. Generally, a large number of veniremen are summoned to the courthouse, around 600 or 700. Many jurors exercise certain allowable rights not to serve; others cannot be found. On appearance day, about 300 jurors or so will show.

The trial judge will perform the initial qualification of the jury panel. Either side may ask for the jury to be shuffled at this point. Jurors will be seated randomly in numerical order. Beginning with juror number one, the first twelve jurors who are not struck or removed for cause will constitute the jury.

The judge will screen out those who cannot speak and write English, who have felony or moral turpitude convictions, and those who are entitled to legitimate legal exemptions from service. In addition, the judge will hear explanations about physical disability, business conflicts, general biases, or other personal issues that might disqualify a juror. The judge may excuse some jurors but not others. At this stage, the attorneys for both sides have minimal input, other than a few questions for individual jurors called to the bench. Frequently, the lawyers for both sides will agree to excuse a juror for some reason. There is a certain Texas statutory provision that allows lawyers on both sides to agree to excuse a juror.

Qualifying the jury to this point is a difficult, day-long affair. Once the venire is qualified for general jury service, they are scheduled for individual voir dire examination. Generally in groups of five to ten, they are instructed to return to court over the next three to four weeks, for individual questioning about their views on the death penalty.

When each juror arrives on his designated day, each side is generally allowed approximately 45 minutes to question the juror. After the juror leaves, each side is permitted to challenge for cause. If granted, the juror is finally excused and deleted from the pool. If challenges for cause are denied, the juror remains in the pool and subject to a peremptory challenge or to become part of the twelve-member petit jury.

There are two methods in Texas for permitting peremptory challenges. For many years, judges required peremptory challenges to be exercised immediately after the juror is questioned individually and challenges for cause denied. This is sometimes called the sequential method of selecting the jury. The State goes first. If the State strikes the juror, the juror is gone. If the State declines to strike the juror, then the right passes to the defense. If the defense strikes the juror, the juror is eliminated. If the defense does not strike the juror, then the juror joins the twelve-member petit jury. This process is repeated until twelve jurors and two alternates are seated. Each side has ten peremptory challenges.

Once the jury is selected and sworn, trial proceeds in the usual fashion. If the defendant is found guilty of capital murder, the sentencing phase begins. In response to the Supreme Court's insistence that the jury decision-making process be guided, Texas has constructed three questions, called special issues. The questions have varied over the years. In Davila's case, only two questions were asked: the future dangerousness question and the mitigation question.

The method of answering the special issues is complicated. If the jurors unanimously answer both questions in the State's favor, as they did here, then the judge sentences the defendant to death automatically. If the jurors answer *unanimously* any one of the questions in the defendant's favor, then the judge will sentence the defendant to life in prison.

Jurors are also told that in order to answer any special issue in the defendant's favor, at least ten of the jurors must agree.

The jurors are *not* told certain outcomes. It is possible that the jurors might fail to agree *unanimously* on the answer in the State's favor to any special issue. If this occurs, then the defendant is sentenced automatically to life in prison. There is no retrial. Unlike in any non-capital case, a hung jury does not result in a retrial in the sentencing phase of a capital case. The result is always either a life sentence or a death sentence. Jurors, however, are not told this.

As a corollary, jurors are also not told that a single juror can decide in favor of a life sentence. Unanimity

is required for a death sentence. A life sentence is the result otherwise, and can be the result of a single juror's decision.

Moreover, jurors are not told what occurs if fewer than twelve jurors agree on an answer to a special issue in the State's favor, but fewer than ten jurors agree on an answer in the defendant's favor. Again, the answer is that the defendant receives an automatic life sentence.

Once the judge pronounces the death sentence and signs the judgment, appeal is automatic to the Texas Court of Criminal Appeals ("CCA"). At the same time that the trial judge appoints an appellate lawyer, the judge will also appoint an attorney to file the defendant's Article 11.071 application for state writ of habeas corpus. The state writ must be filed shortly after the state direct appeal brief is filed, before the CCA decides the appeal. If the direct appeal is affirmed, the defendant has the right to appeal to the United States Supreme Court. Once the CCA denies the direct appeal and the state writ application, the inmate must proceed to federal district court.

GENERAL DISCUSSION OF FEDERAL HABEAS CORPUS

As this application for a writ of habeas corpus arises out of a state proceeding which violated the Constitution of the United States it is subject to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2254(a). Under

AEDPA, "a federal court cannot grant habeas corpus relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of that claim either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Hughes v. Dretke*, 412 F.3d 582, 588-89 (5th Cir. 2005) (citing 28 U.S.C. § 2254(d)).

The "contrary to" and "unreasonable application" clauses under section 2254(d)(1) have independent meaning. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Under the "contrary to" clause a state court decision is "contrary to . . . clearly established Federal law, as determined by the Supreme Court" if: (1) "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases," or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Foster v. Johnson*, 293 F.3d 766, 776 (5th Cir. 2002) *(quoting Williams*, 529 U.S. at 405-06).

Under the second clause, "a state court decision is 'an unreasonable application of clearly established' Supreme Court precedent if the state court 'correctly identifies the governing legal rule but applies it

unreasonably to the facts of a particular prisoner's case.'" *Foster*, 293 F.3d at 776 (*quoting Williams*, 529 U.S. at 407-08). This Court considers a state court "decision to be 'an unreasonable application' of Supreme Court precedent in three situations:

> [(1)] the state court . . . unreasonably applies [the correct governing legal rule] to the facts of the particular [] case . . . [(2)] the state court [] unreasonably extends a legal principle from our precedent to a new context where it should not apply or [(3) the state court] unreasonably refuses to extend that principle to a new context where it should apply."

Sprouse v. Stephens, 13-70018, 2014 WL 1356973 (5th Cir. 2014) (*citing Williams*, 529 U.S. at 407).

Importantly, although AEDPA requires a federal court to review a state court judgment with some degree deference, AEDPA in no way renders a federal judge powerless to reverse a state court judgment rendered in violation of the Federal Constitution. The Supreme Court made this clear in *Williams v. Taylor*:

> In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law. If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody – or, as in this case, his sentence of death – violates the Constitution, that independent

> judgment should prevail. Otherwise the federal "law as determined by the Supreme Court of the United States" might be applied by the federal courts one way in Virginia and another way in California. In light of the well-recognized interest in ensuring that federal courts interpret federal law in a uniform way, we are convinced that Congress did not intend the statute to produce such a result.

Williams v. Taylor, 529 U.S. 362, 389-90 (2000).

A federal court may also grant habeas relief when the state court's adjudication of a claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C.A. § 2254(d)(2). Once again, although this standard is demanding it is "not insatiable," as the Supreme Court has explained, "[d]eference does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

ARGUMENT AND AUTHORITIES

Overview of Claims for Relief

CLAIM ONE: The Evidence Was Legally Insufficient To Sustain Davila's Conviction for the Offense of Capital Murder Under Texas Penal Code 19.03(a)(7)

Because the State Failed to Prove That Davila Intended to Kill More Than One Person

CLAIM TWO: Trial Counsel Rendered Ineffective Assistance of Counsel for Failing to Properly Investigate and Present the Mitigation Case

CLAIM THREE: Davila Was Denied Effective Assistance of Counsel During His Direct Appeal in Violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution By Appellate Counsel's Failure to Recognize, and Raise The Claim, That He Was Convicted by An Improper Statement of Law in the Jury Instructions

CLAIM FOUR: State Habeas Counsel Rendered Ineffective Assistance Counsel

CLAIM FIVE: The Trial Court erred in overruling Davila's motion to suppress his three written statements admitting to the commission of the offense of capital murder pursuant to Franks v. Delaware, 438 U.S. 154 (1978) in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

CLAIM SIX: The Trial Court erred in overruling Davila's motion to suppress his statement admitting to the commission of an extraneous murder offense pursuant to Franks v. Delaware, 438 U.S. 154 (1978) in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

CLAIM SEVEN: The Trial Court erred in overruling Davila's motion to suppress his three written statements admitting to the commission of the offense of capital murder pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

CLAIM EIGHT: The trial court erred in overruling Davila's motion to suppress his statement admitting to the commission of an extraneous murder offense pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

CLAIM NINE: The Trial Court Erred In Overruling Davila's Motion to Preclude the Death Penalty As A Sentencing Option and Declare Tex. Crim. Proc. Code 37.071 Unconstitutional On the Grounds That Texas Law Allows For A Death Sentence Without Grand Jury Review of the Punishment Special Issues in violation of the Fifth and Fourteenth Amendments

CLAIM TEN: The Trial Court Erred in Overruling Davila's Objection to the Constitutionality of Texas's So-Called "10-12 Rule"

CLAIM ELEVEN: The Trial Court Erred in Overruling Davila's Motion to Instruct the Jury That the Sentencing Burden of Proof on the Mitigation Issue Lies With the State

THE FOLLOWING TWO CLAIMS HAVE BEEN ABANDONED:

CLAIM TWELVE: Davila's Trial Was Contaminated By Improper Influence That Affected the Deliberations Process (This Claim has been abandoned.)

CLAIM THIRTEEN: Davila's conviction and sentence were obtained in violation of *Brady* (This Claim has been abandoned for the reasons explicated underneath this claim at the end of our writ).

DETAILED ARGUMENTS

CLAIM ONE: The Evidence Was Legally Insufficient To Sustain Davila's Conviction for the Offense of Capital Murder Under Texas Penal Code 19.03(a)(7) Because the State Failed to Prove That Davila Intended to Kill More Than One Person

Exhaustion: This Claim was raised as point of error one in Davila's direct appeal to the Court of Criminal Appeals. It was addressed on its merits by that court. *See Davila v. State*, AP-76,105, 2011 WL 303265 (Tex. Crim. App. 2011).

On direct appeal to the Court of Criminal Appeals, Davila argued that the evidence was legally insufficient to support his conviction for capital murder because the facts established at trial showed he only intended to shoot one person, Jerry Stevenson, a.k.a. Big Boy Dooney. *Davila v. State*, AP-76,105, 2011 WL 303265 (Tex. Crim. App. Jan. 26, 2011). Davila was prosecuted under a construction of capital murder that requires the intent to kill two or more people. As Davila intended to shoot only one person, he could not have been guilty of capital murder. The Court of Criminal Appeals disagreed, and based on their reading of the record found that Davila had the intent to kill more than one person. Interestingly, the jury apparently agreed with Davila's argument. A note from the jury shows that the jury recognized Davila intended to harm only Jerry Stevenson, but an incorrect jury charge allowed them to convict Davila despite the

state's failure to prove the necessary intent requirement. *See* Claim Three, *Infra.*

I. Capital murder requires the specific intent to kill two people.[3]

The evidence presented at trial was legally insufficient to support Davila's conviction for the offense of capital murder because he lacked the requisite intent to kill more than one person. Stated another way, the evidence raised at trial showed that Davila intended to shoot only Jerry Stevenson, the only adult male present at the scene of the shooting, and no one else.

In order to assess the sufficiency of the evidence, a court must consider whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 308 (1979). As Davila was charged with capital murder for causing the death of two individuals, one essential element to be proven was that he had the specific intent to kill at least two individuals. *Davila*, 2011 WL 303265 at 12-13 (citing *Roberts v. State*, 273 S.W.3d 322, 331 (Tex. Crim. App. 2008)). As the Court of Criminal Appeals has explained:

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[3] Davila recognizes that there are multiple forms of capital murder in Texas, but Davila was only tried for capital murder based on the deaths of two people during the same criminal transaction. *See* 2 RR 3-7.

> Transferred intent may be used as to a second death to support a charge of capital murder that alleges the deaths of more than one individual during the same criminal transaction only if there is proof of intent to kill the same number of persons who actually died, e.g., with intent to kill both Joe and Bob, the defendant killed Joe and Lou. It may also be used if, intending to kill both Joe and Bob and being a bad shot, the defendant killed Mary and Jane.

Roberts v. State, 273 S.W.3d 322, 331 (Tex. Crim. App. 2008). *Roberts* made clear that Texas' transferred intent doctrine cannot be used to increase murder to capital murder on the grounds that the defendant, while intending to kill a single person, actually kills two. *Id.*

II. The evidence at trial showed Davila intended to shoot Jerry Stevenson.

The motive for Davila's actions, clearly demonstrated at trial, and the only scenario that passes the common sense test, was that Davila, a Truman Street Blood, had a grudge against Jerry Stevenson, a member of the Polywood Crips. Three weeks before this offense, Stevenson and Davila had been involved in a separate verbal altercation, again presumably due to their oppositional gang affiliations. 19 RR 61-80. Throughout the trial, the prosecution enthusiastically and repeatedly emphasized to the jury the bitter enmity between the Bloods and the Crips. 16 RR 136-38, 146-70; 18 RR 31-70.

The state's eye witness, Eghosa Ogierumwense, watched as Davila specifically targeted only Jerry Stevenson with his laser sight. 14 RR 138,144-45. One of the wounds sustained by Annette Stevenson was intermediate, meaning that it had struck other targets before entering her body. 18 RR 265-73. The weapon utilized in this offense was described as high-powered. 18 RR 158-59. With the ammunition used in it, the muzzle velocity was great. *Id.* Extrapolating from the testimony of the forensic firearms examiner, the bullets used in the rifle at the approximate range where Davila was standing were capable of traveling through outside walls. Additionally, evidence was developed at trial revealing that Davila's far away vision was exceedingly poor (20/140 in his right eye and 20/80 in his left) and that he did not wear corrective lenses. 19 RR. 96-102.

Jerry Stevenson (a.k.a. Dunna, or Big Boy Dooney) was the only adult male at the house. 15 RR 42-43. The scene of shooting was in a part of Fort Worth known at the time as "Blood" territory. *See, e.g.*, 14 RR 189. It was undisputed at trial that Erick Davila was a member of the Truman Street Bloods gang. 16 RR 54-64. Jerry Stevenson testified that he was not a gang member, but that he hung around many gang members. 15 RR 92-95. Specifically, he said he had friends who were Polywood Crips, but he denied being a Crip himself. *Id.* at 72. However, Stevenson also recognized that the house where he lived (the same house where the shooting took place), was probably identified as a Crip house. *Id.* at 92-95. He further acknowledged that it

could lead to problems when Crips and Bloods lived in the same area of town. *Id.*

It is apparent, in light of the state's developed motive for this shooting, that Davila's sole intent was to kill Jerry Stevenson. Though motive itself is not an element that the prosecution is required to prove, Texas courts have recognized that "evidence of motive is one kind of evidence [that aids in] establishing proof of an alleged offense." *See Crane v. State*, 786 S.W. 2d 338, 349-50 (Tex. Crim. App. 1990); *see also Pollard v. State*, 255 S.W. 3d 184, 188 (Tex. App. – San Antonio 2008) *pet. granted and aff'd*, 277 S. W. 3d 25 (Tex. Crim. App. 2009).

Davila had no dispute with any other person present at the party. Davila fired at Jerry Stevenson; unfortunately, he was a bad shot with bad eyesight and two innocent people were killed by accident. The facts presented at trial were simply legally insufficient to support a charge of capital murder pursuant to Texas Penal Code § 19.03(7)(a).[4]

A note sent by the jury toward the end of their deliberation showed they believed Jerry Stevenson was the only target: "In a capital murder charge, are you

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[4] Although direct appellate counsel did raise the sufficiency issue, she completely failed to identify the fact that the trial court incorrectly instructed the jury regarding Texas' transferred intent law as it applied to capital murder. CR at 1933. The Charge given allowed the jury to convict for capital murder if Davila intended to kill one person, but more than one person was actually killed. *Id.* This issue will be raised in the Ineffective Assistance of Direct Appeal Counsel Claim below.

asking us did he intentionally murder the specific victims or are you asking us did he intend to murder a person and in the process took the lives of 2 others?" CR at 1931. The question clearly established the jury believed Davila intended to murder "a person."

III. The Court of Criminal Appeals' made unreasonable factual findings based on an inaccurate retelling of the trial testimony and the failure to consider relevant evidence.

First, it should be noted that the Court of Criminal Appeals was incorrect that the *jury's verdict* showed Davila "intended to cause more than one death in his 'shoot em up' attack." *Davila*, 2011 WL 303265 at 13. As Davila explains in Claim Three, the jury recognized that he intended to kill only Jerry Stevenson, but the trial court's supplemental jury charge incorrectly allowed Davila's conviction based on the intent to harm a single person.

There were other problems with the Court of Criminal Appeals' factual finding. For example, the court stated that "[Davila] gave a written statement explaining that he intended to 'get the fat dude' and who he mistakenly thought were three guys on the porch." *Id.* at 13. The court used this statement to conclude that Davila intended to kill at least two people, but in doing so the court completed ignored the ample evidence that Stevenson was the only adult male at the birthday party. *See, e.g.*, 15 RR 42-43. Further, the

Court of Criminal Appeals failed to address that Davila also stated he "wasn't aiming at the kids or the woman and don't know where the woman came from." *See* State's Ex. 166. As Davila was not aiming at "the woman" or the kids, and because Jerry Stevenson was the only non-woman and non-kid at the party, it is clear Davila was attempting to harm Stevenson only.

The Court of Criminal Appeals also believed "Cashmonae testified (as did other witnesses) that appellant aimed the 'red dot' at 'different parts of the house' and at different persons." *Davila*, 2011 WL 303265 at 13-14. This summary of Cashmonae's testimony is incorrect. Rather, Cashmonae's testimony concerning the red dot was:

> **Q.** But you did see – you told the jury that you saw a red dot on different parts of the house; is that correct?
>
> **A.** Yes.
>
> **Q.** So was the red – was this red dot going a bunch of places on the house?
>
> **A.** Yes, on the porch.
>
> **Q.** And it went other places besides the porch?
>
> **A.** No.
>
> **Q.** Not that you saw?
>
> **A.** No.

14 RR 43-44. Cashmonae never said she saw the red dot pointed at different persons.

The Court of Criminal Appeals also incorrectly summarized the testimony of Eghosa Ogierumwense. According the court's version of events, "Eghosa said that appellant looked 'frustrated' after the first burst of fire when Jerry or 'Dooney' had escaped into the house, so appellant moved and then fired a second burst at the remaining women and children." *Davila*, 2011 WL 303265 at 14. Once again, the state opinion misstates the facts. Eghosa explained that he could see the beam on Davila's gun on the windows of the house. 14 RR 136. When asked if the beam was anywhere else, he replied "not really." *Id.* Of course, Eghosa also explained that beam was initially on Dooney, but that Dooney walked in the house, this was when Erick started shooting the gun. *Id.* at 138. This establishes that after Stevenson went in the house, Davila started to shoot his gun, and that his gun was aimed at the windows. Clearly, Davila was attempting to shoot Dooney (Stevenson) who had just entered the house. *Id.* The prosecutor made this clear:

> **Q.** Did you see the beam on the women and children?
>
> **A.** No.
>
> **Q.** You never saw the beam on the women and children?
>
> **A.** Nuh-uh.

Id. Eventually the prosecution succeeded in getting Eghosa to change his story slightly:

Q. Let me just ask you this: Did you ever see the beam on the little girl that was on the porch?

A. Huh-uh.

Q. You're saying no, you didn't?

A. No, ma'am.

Q. And do you recall telling us that you did see the beam on the little girl on the porch?

A. Not that I remember.

Q. Do you remember telling us that you saw the beam on the granny? Do you remember that?

A. Yeah.

Q. Okay. So you did see the beam on the grandmother?

A. Yes, ma'am.

Q. So you – so it's fair to say you saw the beam not only on the house, but on the people in front of the house?

A. Yes, ma'am.

Id. at 146-47. The defense cleared up the inconsistency on cross examination:

Q. And in your statement that you gave, you said that you saw the guy point the rifle at Big Boy; is that right?

A. Yes, sir.

Q. And then at some point, Dooney, or Big Boy – do you also know him as Jerry Stevenson?

A. Yes, sir.

Q. Mr. Stevenson walked into the house, correct?

A. Yes, sir.

Q. And this person lowered the gun; is that right?

A. Yes, sir.

Q. Now, you said the beam was on or around Big Boy at one point?

A. It was on him.

Q. It was on him. And no shots were fired?

A. No, sir.

Q. All right. Big Boy walks into the house. And then I believe what you say is is that in your statement, and correct me if I'm wrong, he raises the gun back up, and he just starts shooting at the house, correct?

A. Yes, sir.

Q. That's what you said. There's just shots going everywhere; is that fair to say?

A. Yes, sir.

Q. And you told Ms. Burks initially, now, you told her initially that beam was not on the grandma or the mom and the

children, right? That's what you told Ms. Burks first.

A. No.

14 RR 156-57. Further, defense counsel pointed out that in his statement to the police, Eghosa "never mentioned the beam being on the granny or the children." *Id.* at 159. Instead, Eghosa had told the police "whoever was shooting just started shooting at the house." *Id.* Indeed, Eghosa never remembered the beam being on "Granny" until he met with the Tarrant County District Attorney's office. *Id.* Finally, Eghosa confirmed "[t]hat night [he] only saw the shooter raise the gun and start shooting at the house." *Id.* at 160.

It is unclear how this testimony can support the factual finding that that Davila "moved and then fired a second burst at the remaining women and children." For these reasons, the Court of Criminal Appeals' decision was based on an unreasonable determination of the facts.

IV. Conclusion

As the Court of Criminal Appeals' adjudication of this claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at trial, this Court should grant Davila's Writ and free him from his unconstitutional conviction and sentence.

CLAIM TWO: Trial Counsel Rendered Ineffective Assistance of Counsel for Failing to Properly Investigate and Present the Mitigation Case

Davila's trial attorneys failed to identify and present evidence of severe physical and psychological abuse which Davila suffered at the hands of his mother. They also failed to show that Davila was kicked out of the house at a young age, and while living on the streets was introduced to the gang culture. This powerful mitigation evidence not discovered by the defense team was discovered by mitigation expert Toni Knox during the state writ proceedings by simply interviewing Davila's family members. The abuse uncovered by Knox and presented in her mitigation report far exceeded that presented to the jury at Davila's trial. Indeed, at trial the picture painted for the jury was one of a kid who needed medication for ADHD, had behavior and learning problems, and needed glasses. The evidence that should have been discovered and presented to the jury would have shown that Erick Davila was raised in a house without love, by a mother who treated him like a servant, and who would lash out physically against her children when they did not comply with her demands. Had the trial attorneys followed the minimum standards established by the American Bar Association for death penalty representation, they would have hired their own mitigation expert; however, no mitigation expert was hired by the trial team. Had the jury been presented with this evidence, it is likely that at least one of the jurors would

have refused to answer the special issues in such a way as to result in a death sentence.

This claim was presented to the state district court, which adopted the state's proposed findings of facts and conclusions of law almost in their entirety. By doing so, the state court rendered a decision which was contrary to and an unreasonable application of clearly established federal law, and a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

I. The Law

There are two venerable elements to an ineffective assistance of counsel claim. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (2003). "'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Harrison v. Quarterman*, 496 F.3d 419, 424 (5th Cir. 2007) (citing *Strickland*, 466 U.S. at 690-91). "The Supreme Court has described 'the standards for capital

defense work articulated by the American Bar Association (ABA)' as 'standards to which we long have referred as 'guides to determining what is reasonable.'" *Mason v. Mitchell*, 543 F.3d 766, 774 (6th Cir. 2008) (citing *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)).

In *Wiggins*, the Supreme Court made it clear that merely investigating some aspects of capital defendant's background "did not excuse [the attorneys] from their duty to make a 'fully informed and deliberate decision' about whether to present a mitigation case." *Wiggins v. Smith*, 539 U.S. 510, 519 (2003). "In fact . . . their knowledge triggered an obligation to look further." *Id.* When reviewing counsel's failure to investigate particular leads, the correct assessment is whether counsel's decision not to pursue those leads "actually demonstrated reasonable professional judgment." *Id.* at 527.

The Supreme Court cemented the idea that counsel must investigate "all reasonably available mitigating evidence" in *Rompilla v. Beard*. 545 U.S. 374, 387, n. 7 (2005). In *Mason v. Mitchell*, the Sixth Circuit succinctly explained the holding in *Rompilla*:

> The Supreme Court's decision in *Rompilla* offers a similar example regarding the obligation of counsel to conduct an investigation into "*all reasonably available* mitigating evidence" that includes efforts to gain information from *both* state records *and* family members. *Id.* at 524, 123 S.Ct. 2527 (quotation omitted). In *Rompilla*, the Court noted that Rompilla's counsel did *some* investigation,

which "includ[ed] interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at the guilt phase." *Rompilla*, 545 U.S. at 381, 125 S.Ct. 2456. The Court even observed that "Rompilla's own contributions to any mitigation case were minimal," that Rompilla at times seemed to "send [] counsel off on false leads," and that "counsel spoke to the relatives in a 'detailed manner,' attempting to unearth mitigating information." *Id.* (quotation omitted).

Although Rompilla's counsel certainly conducted some investigation into his background, the Court held that Rompilla's counsel were deficient because they failed to consult available public records relating to Rompilla's prior convictions. *Id.* at 382-90, 125 S.Ct. 2456. In particular, the Court faulted Rompilla's counsel for failing to review records relating to a conviction for rape and assault given the prosecutor's announced plan to use that conviction as a central part of the state's attempt to prove an aggravating factor. *Id.* at 383-84, 388-89, 125 S.Ct. 2456. The Court reasoned that "[i]t flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking." *Id.* at 389, 125 S.Ct. 2456. The Court further stated that "[i]f the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no

> other source had opened up," *Id.* at 390, 125 S.Ct. 2456, and the Court concluded that "[f]urther effort [to research those leads] would presumably have unearthed much of the material postconviction counsel found, *including testimony from several members of Rompilla's family, whom trial counsel did not interview*," *Id.* at 391, 125 S.Ct. 2456 (emphasis added).

Mason v. Mitchell, 543 F.3d 766, 775-76 (6th Cir. 2008).

In addition to deficient performance, "the defendant must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. Under *Strickland*, in order to show prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

In assessing prejudice, a court must reweigh the evidence in aggravation against the totality of available mitigating evidence. *Wiggins*, 539 U.S. at 534. Both the mitigation evidence presented at the trial and that uncovered on habeas should be considered in reviewing prejudice. *Sears v. Upton*, 561 U.S. 945, 945 (2010) ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears

would have received a different sentence after a constitutionally sufficient mitigation investigation.").

Because a single juror can prevent a death sentence in Texas, the proper inquiry in this case is whether there is a reasonable probability that "at least one juror would have struck a different balance" had they been presented with a complete view of Erick Davila's childhood. *Wiggins*, 539 U.S. at 537. Finally, it should be noted that the Supreme Court has "never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented." *Sears v. Upton*, 561 U.S. 945 (2010). Indeed, the Court has "found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Id.* (citing, e.g., *Williams*, *supra*, at 398, (remorse and cooperation with police); *Rompilla v. Beard*, 545 U.S. 374, 378 (2005) (residual doubt)).

II. The Facts – Trial counsel failed to comply with the standards articulated by the American Bar Association, and as result, failed to uncover powerful mitigation evidence.

Davila's trial counsel failed to comply with the standards articulated by the American Bar Association by failing to investigate all relevant evidence, by failing to hire a mitigation expert and instead shouldering primary responsibility for the mitigation investigation

themselves, and by failing to identify and interview multiple family members familiar with Davila's past. Trial counsel's deficient performance resulted in the jury being presented with a woefully incomplete and misleading picture of Davila's life.

A. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases[5]

The introductory commentary to the 2003 ABA guidelines make it clear that trial counsel in a capital case "must promptly obtain the investigative resources necessary to prepare for both phases, including at *minimum the assistance of a professional investigator and a mitigation specialist*, as well as all professional expertise appropriate to the case." http://ambar.org/2003Guidelines, at 925. Guideline 4.1 explains the necessary components to a capital defense team. *Id.* at 952. In addition to two qualified attorneys, the defense should include "an investigator, and a mitigation specialist." *Id.* The commentary to this guideline explains

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[5] A copy of these guidelines is available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2003Guidelines.authcheckdam.pdf. Because Davila's trial took place in 2009, the 2003 version of the guidelines will be used, as well as the 2008 supplement to the guidelines, which can be found at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2008_July_CC1_Guidelines.authcheckdam.pdf. Citations to the two guidelines will correspond to the page numbers at the top right corner of the of the guidelines themselves.

that "[a]lthough some investigative tasks, such as assessing the credibility of key trial witnesses, appropriately lie within the domain of counsel, the *prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation.*" *Id.* at 958. The reason is simple: "Counsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case. Moreover, the defense may need to call the person who conducted the interview as a trial witness." *Id.* at 958.

In addition to the specially trained investigator, "[a] mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings." *Id.* at 959. The guidelines explain that "[m]itigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed." *Id.* The mitigation specialist fulfills many important roles for the defense team:

> The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's

> life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.

Id. In short, "the use of mitigation specialists has become part of the existing standard of care in capital cases, ensuring high quality investigation and preparation of the penalty phase." *Id.* at 960 (internal quotation removed). A defense team including "two attorneys, a fact investigator, and a mitigation specialist" (along with a person who is able to screen individuals for mental or psychological disorders or defects) "is the minimum" allowed under the prevailing norms at the time of Davila's trial. *Id.* at 1003.

The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases further expounds upon the role of the mitigation specialist. *See ABA Supp. Guidelines*, 36 Hofstra L Rev. 677 (2008).[6] "The mitigation specialist must be able to furnish information in a form useful to counsel and any experts through methods including, but not limited to: genealogies, chronologies, social histories, and studies of the cultural, socioeconomic, environmental, political, historical, racial and religious influences on the client

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[6] Available at:

http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2008_July_CC1_Guidelines.authcheckdam.pdf

in order to aid counsel in developing an affirmative case for sparing the defendant's life." *Id.* at 683.

ABA Guideline 10.11, addressing the defense case concerning penalty, explains that "counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation." http://ambar.org/2003Guidelines, at 1055. The commentary to Guideline 10.11 explains the importance of finding lay witnesses to establish the foundation for the mitigation case: "Counsel should ordinarily use lay witnesses as much as possible to provide the factual foundation for the expert's conclusions. Community members such as co-workers, prison guards, teachers, military personnel, or clergy who interacted with the defendant or his family, or have other relevant personal knowledge or experience often speak to the jury with particular credibility." *Id.* at 1062. Further, "[f]amily members and friends can provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants." *Id.* Indeed, the 2008 supplement clarifies that Guideline 10.11 compels the defense team to contact lay witnesses, including "[t]he client's family, extending at least three generations back, and those familiar with the client." *See ABA Supp. Guidelines*, 36 Hofstra L Rev. 677, 691 (2008) ("Guidelines 10.11 – The Defense Case: Requisite Mitigation Functions of the Defense Team").

B. Trial Counsel's deficient performance at the punishment hearing

As explained by Toni Knox in her mitigation report, the defense team appeared to be confused concerning the mitigation specialist role. Writ CR at 25, 28-34. Some of the team members believed that Dr. Fallis "would be conducting the larger mitigation investigation, including collateral interviews, and documenting [Davila's] social history." *Id.* at 26. However, according to attorney Joetta Keene's affidavit, Dr. Fallis' role was simply to "present our mitigation case to the jury. She was not hired as a mitigation investigator." *Id.* at 273. "She formed her opinion by reviewing all of the documentation and records we gave her and by interviewing Erick Davila, his family and friends and anyone we sent her to interview."

In her testimony at the state writ hearing, attorney Joetta Keene explained that she and lead counsel Robert Ford "did not want to delegate the mitigation case." 2 Writ RR at 97. They performed the mitigation investigation themselves. *Id.* Mrs. Keene's testimony was that the investigation of Erick's defense "took us about a week." *Id.* at 101. On cross examination, Mrs. Keene explained that investigator Gary Cooper was the investigator for guilt and innocence. *Id.* at 139. She also reaffirmed that Dr. Fallis was not a mitigation investigator and was not used in that capacity. *Id.* at 140. Amazingly, Mrs. Keene volunteered that she did not know what was meant by the term "mitigation specialist." *Id.* Mrs. Keene also admitted that she and Mr. Ford did not even know that some of the family

members who provided mitigating evidence to Toni Knox existed. *Id.* at 145. The thrust of Mrs. Keene's testimony is that she and attorney Robert Ford did not hire a mitigation investigator or specialist to focus on the mitigation the case. Considering the wealth of evidence uncovered by mitigation specialist Toni Knox preparing her report for the state writ proceedings, evidence not found or presented by the trial attorneys, it is clear that the attorneys' failure to hire a mitigation specialist hurt Davila's case.

As explained in the fact section, *supra*, the defense's punishment case began with Erick's father testifying. Mario Davila explained that he was serving a 20-year sentence for murder, that he was 28 when he impregnated Erick's mom Sheila, who was 13 at the time, and that he had been in prison for almost all of his children's life. 23 RR at 219-240. On cross examination, he explained that Sheila was good mom who had a support system to help her raise her kids. *Id.* at 249-251. Erick's twin sister Emily testified that her mother kicked her out of the house when she was 16, that Erick was kicked out when he was 15, and that she and her mom had been in physical fights before. 24 RR at 11-30. No mention was made of severe mental or physical abuse.

Sheila Olivas, Erick's mom, explained the circumstances surrounding her pregnancy at age 13, that she was a poor teenage mother, and that her sister would help support her family. *Id.* at 48-60. Although she thought she was an overprotective mother, she did admit that she never went to see her son in jail until six

weeks after his arrest, and that she was too busy to meet with his attorneys. *Id.* at 60-80. The defense established she would not have even showed up for trial, but she was threatened with arrest if she failed to do so. *Id.* at 91-94. On cross examination, Sheila claimed that she did everything she could for her son, and that his problems in school came from the fact that "you had to touch him for him to focus." *Id.* at 97-99. No mention was made of physical or mental abuse. Indeed, none of the family members called to testify mentioned anything about poor nutrition, physical abuse, or mental abuse in Erick's life.

Dr. Fallis was the main mitigation witness. She established that Erick had behavior problems from a young age, that he did not play sports as a kid, and that he had borderline IQ scores. *Id.* at 191-200. She believed that Erick's education had been neglected by Sheila because she did not make him wear glasses or take his ADHD medicine. *Id.* at 231-32. Dr. Fallis also explained that Erick's stepfather had beaten his mother, and that Erick had witnessed this abuse. *Id.* at 247. Dr. Fallis did her best with the limited information she had to put Erick's life into context.

C. Mitigation Specialist Toni Knox uncovers a wealth of mitigation evidence.

In her report prepared for the state habeas proceedings and submitted to the state habeas court, Toni Knox identified a wealth of mitigation evidence never discovered by Davila's trial team. This information was

described in Knox's report, the relevant portion of which can be found at pages 34-56 of the writ clerk record. Writ CR at 34-56. Toni Knox swore to the contents of her report, which concluded that "one of the most critical themes regarding the abuse and neglect by Erick's mother was lost due to the lack of investigation." Writ CR at 55-56. As an appendix to her report, Knox included sworn affidavits from family members and investigators who interviewed family members detailing Erick's horrible childhood. *See Id.* at 145-174.

The new evidence found by Knox is discussed in detail in the fact section, supra, and is reproduced here:

- Rosa Nash Jones, Erick's step-grandmother, and Sheila's step-mother, explained that Sheila had always been a trouble maker, even going so far as to fist fight her step-mother at the age of 12. Writ CR at 147. Instead of being sold as a virgin to Mario Davila, Sheila was already sexually active and had been sneaking out of her house and engaging in sexual relations prior to her relationship with Mario (meaning that Sheila lied to her teenage son, Erick, concerning his being conceived by rape). *Id.* Sheila would lie and steal frequently. *Id.* at 148. **Sheila "would beat the tar out of [Erick and Emily] and they were punished harshly for any little thing they did."** *Id.* Erick and Emily were forced to stand in the corner for hours. Sheila would go out and party for days at a time, leaving her kids with her dad while she was gone. *Id.* Erick was malnourished as a kid; his

granddad once noticed his "stomach sticking out just like the starving kids Floyd saw on television. His arms and legs were very thin and he was not very responsive." *Id.* After Erick moved in with his grandparents his stomach stopped swelling and he became more responsive. *Id.* at 149. Sheila never showed Erick or Emily any love. *Id.* Rather than let Erick and Emily play with other children, Sheila made Erick and Emily stay inside and clean the house. *Id.* Sheila would sometimes lock Erick and Emily in the closet for hours. *Id.* "It was like Sheila wanted them to suffer and wanted to punish them for some reason." *Id.* at 150. Rosa was never contacted by anyone from the defense team. *Id.*

- Sandra Kay Vargas is the daughter of Rosa Carter Nash. She confirmed that Sheila was a wild teenager, who would sneak out of the house to see boys and who would fight with her mother. *Id.* at 150. When Erick was a boy he did not have enough food to eat, and Sandra actually witnessed several occasions where Sheila was extremely abusive to Erick. *Id.* Once, when Erick was four or five, Erick spilled some of his breakfast causing Sheila to jerk "him off the floor by the arm" and beat him "in the back with her fist." *Id.* Sandra confirmed that Erick and Emily were forced to stand in the corner for hours with their heads against the wall and also forced to stay in the closet for hours. *Id.* at 151. When Erick was 12, his mother kicked him out of the house, and Sandra found Erick living on the streets. *Id.* By the time he was 15 years old, Erick was

tough as nails and had a dead look in his eyes. *Id.* Sheila would not let Sandra take Erick and Emily because she was collecting welfare money she did not want to give up. *Id.* Sandra was never contacted by anyone from Erick's defense team. *Id.* at 152.

Ethel Fay Jones is Sheila Jones's older sister. *Id.* at 155. She confirmed that Sheila pursued Mario, and that she would sneak out of the house to spend time with him. *Id.* at 155-56. She was already sexually active when she began seeing Mario. *Id.* at 156. Indeed, Sheila's father had no idea that she was sexually active until she became pregnant. *Id.* Sheila was lying about being sold to Mario. *Id.* After Sheila met Santos and they began living together, Erick and Emily were treated like outcasts. *Id.* at 157. Ethel also recalled arguing with Sheila about her treatment of Erick and Emily. *Id.* She remembered them being forced to stand in the corner all day. *Id.* They were only permitted to move to use the bathroom. *Id.* Ethel remembered seeing "permanent stains where Erick had cried on the wall and marks where his forehead had been pressed against the wall for so many hours." *Id.* at 157. She would also slap and belittle Erick and Emily, although she would not do this to her other children. *Id.* at 158. Sheila took her children out of school because she was lazy and wanted them to do what she wanted done; this was necessary because "God told her He does not want her to work." *Id.* Ethel once watched Sheila slapping Erick and then kick him off the porch, and he landed on his head. *Id.* Once,

Ethel was talking with Erick and Sheila came up and slapped him for no reason. *Id.* at 159. At one point, **Sheila told Emily "I could have killed you two a long time ago"** and they were not sure what she meant by that, if she meant have them aborted or actually killed them. *Id.* at 158.

- Linda Jones Mireles is Erick's cousin and Sheila's niece. *Id.* at 163. She once lived with Erick and Emily and saw how Sheila made them constantly clean the house. *Id.* Sheila would also tell Erick and Emily that she hated them. *Id.* Linda saw the tear streaks on the wall from Erick and Emily had been standing for so long. *Id.* at 164. Erick felt like the gang was his family; when his mom kicked him out an older gangster took him in. *Id.* Erick's life never included having any fun. *Id.* at 165. Linda was not contacted by any members of the defense team before Erick's trial. *Id.* She would have testified had she been contacted. *Id.*

- Elizabeth Olivas is Santos Olivas' sister. *Id.* at 168. Santos was Erick and Emily's step dad. *Id.* She explained that Sheila acted like a "queen" and made Erick and Emily do all the work around the house. *Id.* "If Erick or Emily ever complained about the abusive environment, Sheila would harshly punish them with physical violence. *Id.* She also explained that Sheila was a very violent person. *Id.* Elizabeth said that she was sorry that the defense team never contacted her, because she would have

explained the effects Sheila had on her children if given the chance. *Id.* at 169.

III. Trial counsel was ineffective for failing to hire a mitigation specialist and for failing to properly investigate Davila's background.

The Supreme Court has repeatedly explained that "'[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland*, 466 U.S. at 688. The Court has relied on the ABA guidelines, discussed above, in establishing the prevailing professional norms. *Id.* at 522. The defense team in Davila's case representation was unreasonable because they failed to hire a mitigation specialist who would have uncovered Davila's traumatic childhood.

Counsel was also ineffective for failing to conduct a thorough investigation into Davila's background. The Supreme Court, in *Wiggins*, explained that its holding in *Williams v. Taylor* made this investigation an inescapable duty: "Our opinion in *Williams v. Taylor* is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied *Strickland* and concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the

defendant's background.'" *Id.* (citing *Williams*, 529 U.S. at 396). This precedent comes from *Strickland*, where the Court explained the deference owed to strategic judgments related to the adequacy of an investigation:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. In short, it was unreasonable for the defense team to fail to hire a mitigation specialist[7], and it was unreasonable for the defense

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[7] The Fifth Circuit recently noted that counsel's failure to "hire a mitigation specialist" was relevant in its decision to grant a Certificate of Appealability in *Escamilla v. Stephens*, 12-70029, 2014 WL 1465361 (5th Cir. Apr. 15, 2014) ("Third, counsel declined to hire a mitigation specialist, failed to obtain a psychological evaluation for their client until after trial began, and failed to ensure that the expert evaluating Licho was aware of his family background and social history.").

team to limit their investigation to a few family members who were apparently unable, or unwilling, to divulge the true extent of Davila's horrendous upbringing. This deficient performance was in spite of red flags raised by Davila's mother's refusing to cooperate with the defense team, and Emily Davila's obvious ongoing conflicts with her and Erick's mother.

Nor does the fact that the defense team conducted some investigation bring their representation into the zone of reasonableness. In *Wiggins*, the Court explained that "[i]n assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id.* (citing *Strickland*, 466 U.S., at 691). Although the defense team did speak with, and call as witnesses, a few of Davila's family members, their failure to conduct a full mitigation investigation, compounded by their failure to secure the services of a mitigation specialist, cannot be excused as strategic.

Analogous to Davila's case is *Mason v. Mitchell*, 543 F.3d 766 (6th Cir. 2008), where the Sixth Circuit found defense counsel's mitigation presentation deficient in spite of the fact that counsel met with multiple family members. "Mason's 'claim stem[med] from

counsel's decision to limit the scope of their investigation into potential mitigating evidence' to be presented at the sentencing phase of a capital trial." *Id.* at 772 (quoting *Wiggins*, 539 U.S. at 521). The Sixth Circuit pointed out that the current standards for defense counsel "provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Id.* (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), at 93 (2d ed. 1989)). The attorneys in *Mason* did conduct an investigation that included "very brief" contacts with members of Mason's family, reviewing records of his criminal history, his involvement with Children Services, and drug treatment programs, and reviewing some educational records. *Id.* at 777. Counsel also met with Mason's wife several times, as well as other family members. *Id.* at 778. However, counsel failed to ever contact several of Mason's relatives. *Id.* The Sixth Circuit went on to decide that counsel's failure to conduct interviews with other relatives constituted deficient performance. *Id.* at 779.

Discussing prejudice, the Sixth Circuit explained that "Mason thus 'has the kind of troubled history that [the Supreme Court] ha[s] declared relevant to assessing a defendant's moral culpability,' and we therefore hold that 'had the jury been confronted with this considerable mitigating evidence, there is a reasonable

probability that it would have returned with a different sentence.'" *Id.* at 781 (citing *Wiggins*, 539 U.S. at 534, 536).

Davila was also prejudiced by his trial team's deficient performance. The test for prejudice is whether there is a reasonable probability that "at least one juror would have struck a different balance" had they been presented with a complete view of Erick Davila's childhood. *Wiggins*, 539 U.S. at 537. Davila's case meets that standard, in part, because we know at least one juror was struggling with her vote in the punishment phase. In her affidavit, Joetta Keene explained that she remembered Juror Sabrina Gundy struggling with her decision while sitting on a park bench during a lunch break. Writ CR at 277. Keene explained that she "watch[ed] the older African American woman sit alone. [She] watch[ed] her cry on that park bench. In that moment, [she] knew we were losing our last holdout." *Id.* Mrs. Keene believed it was the jail escape that had cemented a death sentence for Davila, *Id.*, but that idea was surely based on her understanding of the mitigation case, which did not include the palpable evidence of Davila's troubled upbringing.[8]

Importantly, the fact there is some overlap between the evidence presented at trial and the evidence presented at the writ hearing does not preclude a finding of ineffective assistance of counsel. *See, e.g.*,

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[8] It should also be noted that the jury instructions were submitted to the jury at 10:15 a.m., on February 26, 2009, and that the jury was unable to reach a verdict until 11:33, the next day.

Richards v. Quarterman, 566 F.3d 553, 568 (5th Cir. 2009) ("The fact that there is 'some overlap' among the excluded testimony and what came out trial will not necessarily preclude relief"); *Harrison v. Quarterman*, 496 F.3d 419, 426 (5th Cir. 2007) (finding ineffective assistance of counsel where defense counsel failed to produce testimony of an eyewitness to an alleged crime, although there was "some overlap between" the testimony not presented and that presented at trial). Newly discovered evidence that could have been testified to at trial is not cumulative where it would have added a great deal of substance and credibility to the defendant's defense. *Stewart v. Wolfenbarger*, 468 F.3d 338, 359 (6th Cir. 2006)). Nothing presented at trial approached the reality of Davila's abusive childhood, which would have been testified to in harrowing detail by witnesses still disturbed by Sheila's cruelty and neglect.

Had trial counsel complied with the relevant professional norms, as established by the ABA guidelines for capital defense, they would have obtained the services of a mitigation specialist, and they would not have stopped their investigation without contacting all of the people who could shed light on Davila's background and upbringing. By failing to abide by the prevailing professional norms, trial counsel cost Davila the opportunity to have evidence of his extremely abusive upbringing put before the jury, and this failure cost Davila his constitutional right to effective representation at the punishment phase of his trial.

IV. The state court's adjudication of this claim was based on an unreasonable determination of the facts in light of the evidence presented at the state court hearing.

The trial court adopted the state's proposed findings of fact and conclusions of law verbatim, with the exception of two sentences. By doing so, the trial court based its decision on grounds that were at odds with the facts established at the state level. *See* Writ CR at 299-352.[9] The Court of Criminal Appeals simply adopted the trial courts findings and conclusions related to this issue without further discussion. *Ex Parte Davila*, WR-75,356-01, 2013 WL 1655549 (Tex. Crim. App. Apr. 17, 2013). The following state court findings of fact are factually unreasonable:

91, 94, 95: "The 'new' evidence brought forth by the applicant in connection with his writ application would have only served to augment the evidence and themes advanced by Ford and Keene during trial, but nothing the Applicant now presents in connection with his writ provides substantially unique and impactful evidence."

"In short, Dr. Fallis' testimony, as well as the testimony of the other witnesses Applicant's trial attorneys called during the underlying punishment trial, showed the

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[9] The trial court's findings of facts and conclusions of law did not include proposed factual finding 75 or proposed legal conclusion 10; other than those two sentences, the entirety of the state's proposed findings of fact and conclusions of law was adopted by the trial court. *See* Writ CR at 308, 311,338, 342.

Applicant's trial team had prepared an in-depth mitigation investigation."

"Applicants trial attorneys presented substantially the same evidence now brought forth by the applicant, although the applicant's trial attorneys had a narrow group of credible, willing witnesses to present to the jury."

RESPONSE: These three findings of facts, discounting the profuse and detailed evidence of severe physical and psychological abuse uncovered by Toni Knox, could not be more incorrect. The trial team completely failed to uncover, or present to the jury, any evidence of physical abuse, any evidence that Erick and Emily were forced to stand in the corner for hours, were locked in the closet for hours, or the fact that Erick and his sister were forced to wait on their mother hand and foot. There was no mention at the trial that Sheila told Emily that she could have killed Emily and Erick a long time ago. Nor was it mentioned that Erick and Emily were treated as outcasts once their mother took up relationships with their stepfather, Santos.

90: "Ford and Keene presented a holistic, comprehensive, and thorough mitigation case on the Applicant's behalf. It covered the totality of the Applicant's life and brought forth meaningful themes designed to persuade the jury to vote in the Applicant's favor on thc mitigation special issue."

RESPONSE: For the reasons state [sic] above, the presentation of defense counsel cannot be described as holistic, comprehensive, or thorough, as defense counsel completely failed to identify and

present to the jury the fact that Davila suffered severe abuse at the hands of his mother.

26, 27: "In preparing for trial, Keene spoke with Lisa Wallace (the mother-in-law of Emily Davila). Wallace provided the defense team with information useful for the Applicant's mitigation case, but Wallace also told the Applicant's trial attorneys she did not want to testify at trial. (2 WRR 115, 116-17; Keene affidavit, p. 3); Keene made the strategic decision not to call Wallace to testify on the Applicant's behalf because Keene believed the risks attendant to calling a reluctant defense witness outweighed any potential benefit Wallace's testimony would provide to the Applicant's mitigation case. (2 WRR 117)."

RESPONSE: In her sworn affidavit, Wallace stated she would have been willing to testify at trial had she been asked to do so by the defense team. *Id.* Writ CR at 174. The trial court failed to take this statement into consideration.

30. "The Court gives no credence to the hearsay attributed to Rosa Nash Jones that is presented in the affidavit of Toni Knox. Jones' alleged second-hand statements are unsworn, unverified, and unrecorded."

RESPONSE: The comments of Rosa Jones Nash were sworn to by investigator James Hughs, under the penalty of perjury. Writ CR at 174.

33. "Much of the information Knox obtained during her interview with Linda Mireles was already known to the Applicant's trial team and presented to the jury through testimony provided by different trial witnesses. (2 WRR 77-78)."

RESPONSE: Linda Mireles would have added new significant evidence to the mitigation case, including the fact that Emily and Erick were constantly told by their mother that she hated them, that there were tear streaks on the walls from where the children were forced to stand in the corner for hours at a time. Writ CR at 163-66. She would have testified that she lived with Erick while he worked for her husband, that he was a good worker but that Sheila forced him to give her every paycheck on payday. *Id.* at 163. Sheila, who did not work, would yell at Erick for trying to keep any money that he earned, leaving him with "almost nothing to live on." *Id.* Erick sometimes tried to keep more than one job, but this was mainly to give his mother more money, as he "desperately wanted love from Sheila and was always trying to please her." *Id.* at 163-64. She would have added that Erick was first taken in by gang members when he was kicked out of the house. *Id.* at 164. The fact that Erick was kicked out of the house and living on the streets when he first came into contact with the gang members explains how he ended up throwing his life away in the name of his gang. Further, Linda Mireles was never contacted by the defense team. *Id.*

34: "Much of the information Knox obtained during her interview with Elizabeth Olivas was already known to the Applicant's trial team and presented to the jury through testimony provided by different trial witnesses. (2 WRR 82)."

RESPONSE: Elizabeth Olivas would have testified that "If Erick or Emily ever complained about the abusive environment, Sheila would

harshly punish them with physical violence." *Id.* at 168. She also explained that Sheila was a very violent person. *Id.* There was literally no evidence of physical abuse presented at Davila's punishment phase.

52, 55: "The Applicant's trial attorneys hired Dr. Emily Fallis to evaluate and question certain defense witnesses tendered to her by the trial attorneys. (24 RR 156, 179c80 [sic]; 2 WRR 96, 140-41); Dr. Fallis did not serve as the 'mitigation investigator' for the Applicant's trial team. (2 WRR 97; Keene affidavit, p. 1)."

RESPONSE: This idea is in conflict with the following statement found in Dr. Goodness' report, mentioned in Knox's report to Richards: "No records were supplied to this examiner. I was advised that Dr. Fallis would be conducting the larger mitigation investigation, including collateral interviews, and documenting his social history." Writ CR at 26.

86, 92, 93: "Knox believes the lead attorney in a capital murder defense team should delegate the responsibility for leading the mitigation investigation to a qualified mitigation specialist. (2 WRR 23); It is the prevailing practice of criminal defense attorneys in Tarrant County, Texas, to lead and conduct their own mitigation evidence investigations in death penalty cases rather than delegate that duty to someone else, especially a non-lawyer.

The prevailing professional standards in Tarrant County for capital murder cases require that criminal defense attorneys not delegate the conduct of all witness interviews to a non-attorney mitigation specialist

because it is the attorneys themselves who have ultimate responsibility for the accused's defense."

RESPONSE: These series of factual findings are rather troubling, not only because they fly in the face of the ABA guidelines, which require a mitigation specialist, but also because the trial judge herself (the same judge who signed the findings of facts) stated, during a discussion with counsel, that "the law requires them to hire a mitigation expert. The law requires them to hire some – you know, requires a mitigation expert, encourages psychiatric testimony, and – and for them to at least have those test done." 7 RR at 257. It appears the trial judge believed that in *addition* to psychiatric testimony, a mitigation expert was required by law.

V. The state court's adjudication of this claim resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law.

The following conclusions of law involve unreasonable applications of, or are contrary to, clearly established federal law:

7: "The United States Supreme Court has previously held that where trial counsel's investigation consisted of interviewing all witnesses brought to his attention, discovering little that was helpful and much that was harmful, counsel's 'limited' mitigation investigation was reasonable under *Strickland. Burger v. Kemp*, 483 U.S. 776, 794 (1987)."

RESPONSE: Applying *Burger v. Kemp* was an unreasonable application of clearly established federal law because although the court identified the governing legal rule, it applied that rule unreasonably to the facts of Davila's case. First, all the evidence uncovered by habeas counsel in *Kemp* contained damaging facts, and, according to the Supreme Court, "the papers are by no means uniformly helpful to petitioner because they suggest violent tendencies that are at odds with the defense's strategy of portraying petitioner's actions on the night of the murder as the result of Stevens' strong influence upon his will." *Burger v. Kemp*, 483 U.S. 776, 793 (1987). Unlike the evidence in *Kemp*, the evidence uncovered by Toni Knox would not have led to the introduction of damaging facts, and the fact that Davila was severely abused as a child could do nothing but mitigate his role in the offense and tended to explain how Davila ended up the way he did. Further, in *Kemp,* "[t]he record at the habeas corpus hearing does suggest that [defense attorney] Leaphart could well have made a more thorough investigation than he did." *Id.* at 794. Of course, the evidence presented by Davila showed that his trial counsel could have made a much more thorough investigation. Also, unlike the attorney in *Kemp*, it does not appear that Davila's attorneys interviewed "all potential witnesses who had been called to his attention." *Id.* at 795.

8. "When an applicant claims his trial counsel provided ineffective assistance by performing an inadequate investigation into mitigation evidence, the applicant must demonstrate that the evidence he claims his trial counsel should have uncovered and presented to the jury was evidence that was *reasonably available* before trial. *Martinez*, 195 S.W.3d at 729."

RESPONSE: This conclusion of law is contrary to clearly established federal law because the state court applied a rule that contradicts the governing law set forth in Supreme Court cases. Where a petitioner shows that his trial counsel failed to uncover and present voluminous mitigation evidence, the proper inquiry is whether counsel "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (internal citation omitted). The question is not whether the witnesses who trial counsel failed to identify would have been willing to testify, but rather, "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [Davila's] background *was itself reasonable.*" *Id.* at 523. (*See also* Conclusion of Law 24 which relies on the same flawed legal reasoning).

12: "The Applicant has brought forth no *significant* new evidence regarding the mitigation special issue. *Contrast Sears v. Upton*, 130 S. Ct 3259 (2010) (habeas litigation revealed *significant* new mitigation evidence); *Williams*, 529 U.S. at 395 (applicant "uncovered extensive records" relating to mitigation that would have also been available to trial counsel). The "new" evidence brought forth by Applicant is neither significant relative to the evidence reviewed in *Sears* nor

"extensive" relative to the evidence reviewed in *Williams*. Thus, Applicant cannot establish deficient performance under *Strickland's* first prong."

RESPONSE: In relying on *Williams*, the state court confronted a set of facts materially indistinguishable from those in Davila's case and nonetheless arrived at a result different from the Supreme Court precedent. In *Williams*, like in Davila's case, trial counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody." *Williams v. Taylor*, 529 U.S. 362, 395 (2000). Similarly, Davila's counsel failed to uncover facts showing that he also lived through a nightmarish childhood, forced to serve his mother's every need, and being beaten when he failed to live up to her expectations. Further, as in Davila's case, the state courts "prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence

in aggravation." *Id.* at 397-398. The state court should have granted Davila's writ for the same reason the Supreme Court reversed the appellate court's failure to do so in *Williams.*

Sears is inapplicable to the deficient performance prong because that case clearly revolved around the state court's failure "to apply the correct prejudice inquiry we have established for evaluating Sears' Sixth Amendment claim." *Sears v. Upton*, 561 U.S. 945 (2010).

13,14: "This Court agrees with Keene's assessment of the new evidence brought forth by the Applicant in connection with his claim of ineffective assistance of counsel: None of the 'new' evidence offered by the applicant through Toni Knox would have changed how the jury voted on the special issues in this case because the substance of Applicant's "new" evidence had already been put forth by Ford and Keene in other formats or via different witnesses. *See Martinez*, 195 S.W.3d at 727-28 (Jury heard same evidence at trial, albeit through different witnesses, of defendant's horrible childhood). Thus, Applicant cannot establish prejudice required under *Strickland's* second prong.

This Court specifically concludes the evidence attributed by Knox to Rosa Nash, Sandra Vargas, Linda Jones Mireles, and Elizabeth Olivas would not have made a quantitative difference to the jurors in this case given the similarity of other evidence already presented at trial. *Cf. Martinez*, 195 S.W.3d at 727-28."

RESPONSE: These conclusions of law are of course premised on the incorrect factual finding that no new evidence was presented in this case. Further, the state courts "prejudice determination

was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-398. Instead, the state court focused in inquiry solely on whether or not it considered the additional evidence identified by Toni Knox to be "new." Finally, the state court failed to recognize that the proper inquiry in this case is whether there is a reasonable probability that "at least one juror would have struck a different balance" had they been presented with a complete view of Erick Davila's childhood. *Wiggins*, 539 U.S. at 537.

20. "Ford and Keene's decision to direct, lead, and conduct the mitigation investigation was reasonable and consistent with the prevailing professional norms among the criminal defense bar of Tarrant County, Texas, during the relevant time period."

RESPONSE: "The Supreme Court has described 'the standards for capital defense work articulated by the American Bar Association (ABA)' as 'standards to which we long have referred as guides to determining what is reasonable.'" *Mason v. Mitchell*, 543 F.3d 766, 774 (6th Cir. 2008) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003)). By limiting the prevailing professional norms to those found in Tarrant County, Texas, the state court contradicted the governing law set forth by the Supreme Court of the United States. Further, the fact that an entire county fails to follow the standards for capital defense as identified by the Supreme Court should not excuse trial counsel's failure to

follow those established norms. (*See also* Conclusion of Law 21, 22, and 23, which also do not follow the norms established by ABA, discussed above).

IV. CONCLUSION

Davila's trial attorneys' deficient mitigation performance cost him the ability to present evidence of severe abuse to the jury. Had Davila's full story been presented to the jury, there is a reasonable probability that at least one juror would have voted for life, meaning that Davila was prejudiced by his trial counsels' deficient performance. By adopting the state's proposed findings of facts and conclusions of law, the state habeas court rendered a ruling that was based on an unreasonable determination of the facts, and was based on an unreasonable application of clearly established federal law. For these reasons, this Court should find that Erick Davila's trial counsel rendered ineffective assistance of counsel during the punishment phase of his trial, reverse his death sentence, and order the State of Texas grant him a punishment phase where he is assisted by constitutionally effective counsel.

CLAIM THREE: Davila Was Denied Effective Assistance of Counsel During His Direct Appeal in Violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution By Appellate Counsel's Failure to Recognize, and Raise The Claim, That He Was Convicted by An Improper Statement of Law in the Jury Instructions

I. Direct appeal counsel was ineffective for failing to raise a claim related to the incorrect transferred intent instruction.

A. Baseline Legal Principles

Davila contends that appellate counsel owes him a duty of competent representation. This is particularly true in a capital case, because "there is a significant difference between the death penalty and the lesser punishments." *Beck v. Alabama*, 447 U.S. 625, 637 (1980). The constitutional standard for judging the effectiveness of counsel under the Sixth Amendment is a two-prong test, requiring that the petitioner show: (i) counsel's performance was so "deficient," that counsel did not provide "reasonably effective assistance," and (ii) that counsel's errors prejudiced the defense by depriving the defendant of a fair trial whose result is reliable. An attorney is ineffective if he or she "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The right to effective assistance of counsel at the appellate level is rooted in the Sixth Amendment right to effective

assistance of counsel. *Evitts v. Lucey*, 105 S.Ct. 830, 835 (1985).

B. Initial Jury Instruction as to Capital Murder

As explained in the fact section, the State of Texas never requested a transferred intent instruction, which is specifically allowed by Tex. Penal Code § 6.04. 19 RR 137-159. The jury was given the following instruction as to capital murder:

> Now, If you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, In Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did Intentionally or knowingly cause the death of an Individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

CR at 1924.

Not to belabor the point, but 'transferred intent' was not included because it was not requested. It necessarily follows that the charge as given did not permit the jury to convict Davila of capital murder unless he had the specific intent to harm both Queshawn ***and***

Annette Stevenson. This charge was given to the jury at the beginning of the day on February 19, 2009.

C. Flawed Supplemental Instruction in Response to Jury's Note

In the middle of the afternoon, after the parties had closed and the jury had been deliberating for four hours, the jury sent the following note to the judge:

> In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others

Id. at 1931.

The note clearly suggested that the jury believed Davila had intended to kill one person, and did not know if this level of intent was sufficient for a capital murder when the allegation was that two people were killed.

The judge responded with an incorrect instruction, which did not clarify that Davila must intend to kill two distinct people before he could be convicted of a capital murder. To wit:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, armed [sic], or otherwise affected.

CR at 1933. Davila made a contemporaneous objection to this charge, but the objection was overruled. 20 RR 53.

After receiving the incorrect charge, the jury quickly returned a guilty verdict for capital murder. CR at 1934.

D. Unalloyed Legal Error

The additional charge given contained an incorrect statement of the law because it failed to recognize that in Texas one must have the specific intent to murder *at least two people to be guilty of capital murder*; it is not enough that a person attempted to murder a single person, and accidently killed two. *See Roberts v. State*, 273 S.W.3d 322, 330 (Tex. Crim. App. 2008).

The charge given, however, misled the jury by instructing them that, contrary to law, they could find Davila guilty if he had the intent to kill one person, as long as two people ultimately died.

E. Piquant Harm

"In giving additional instructions to a jury – particularly in response to inquiries from the jury – the court should be especially careful not to give an unbalanced charge." *United States v. Acosta*, 763 F.2d 671, 679 (5th Cir. 1985) (quoting *United States v. Sutherland*, 428 F.2d 1152, 1158 (5th Cir. 1970)).

The unbalance is so striking in the supplemental instruction given in Davila's case that it reduces to as little as one word: "person." The supplemental instruction reads "a different person was injured, armed [sic], or otherwise affected."

By contrast, the initial jury instructions repeatedly used the conjunctive words "and" and "both murders" to describe the deaths of Annette and Queshawn.

"The last word is so often the decisive word." *United States v. Arboleda*, 20 F.3d 58, 61-62 (2d Cir.1994).

II. Had this issue been raised on direct appeal, the issue would have been meritorious

There can be no doubt that this issue should have been raised on appeal, and had it been raised, Davila's conviction would have been reversed. In Texas, "[t]he manner in which appellate courts analyze jury charge error is prescribed in article 36.19 of the Code of Criminal Procedure." *Heins v. State*, 157 S.W.3d 457, 460 (Tex. App. – Houston [14th Dist.] 2004, no pet.) (citing *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App.1986) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)). A reviewing court first determines whether error exists in the charge, and then must determine whether any error caused harm sufficient to require reversal. *Id.* As explained above, error existed in the charge because it permitted the jury to convict Davila even if the jurors believed that he intended only to kill Jerry Stevenson.

The Court of Criminal Appeals concisely explained charge error harm analysis for Texas in *Murphy v. State:*

> A defendant is entitled to be convicted upon a correct statement of the law. When the trial court fails to correctly charge the jury on the applicable law, "the integrity of the verdict is called into doubt." Cases involving preserved charging error will be affirmed only if no harm has occurred. "Some harm" under the *Almanza* analysis means any harm. Presence of any harm, regardless of degree, which results from preserved charging error, is sufficient to require reversal of a defendant's conviction.

44 S.W.3d 656, 665-66 (Tex. App. – Austin 2001, no pet.). Clearly, an erroneous jury charge that precludes a defendant's sole defense – in this case, that Davila lacked the necessary intent to be guilty of capital murder – harms a defendant. As *any harm at all* from this charging error would have required reversal, Davila's case would likely have been reversed had this issue been raised on appeal.

However, even if the objection lodged by the defense counsel was not sufficient to specifically cover the charging error, relief would still have been granted had the issue been raised on appeal. In Texas, failure to properly preserve jury charge error does not preclude review, but changes the degree of harm necessary for reversal. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)). If the charging error was not preserved at the trial court level, a greater degree of

harm, egregious error, is required. *Id.* However, the egregious harm standard is met in cases like Davila's, where the jury charge error goes "to the basis of the case and vitally affecting appellant's defensive theory." *Heins v. State*, 157 S.W.3d 457, 461 (Tex. App. – Houston [14th Dist.] 2004, no pet.) (citing *Almanza*, 686 S.W.2d at 172). The jury's note and the timing of its verdict show that its decision clearly hinged on the requisite intent. The harm of this egregious charging error – going directly to the sole defensive issue – was magnified by the fact that the jury immediately relied upon it to find Davila guilty.

III. Failing to raise a single meritorious appellate issue constitutes ineffective assistance of counsel.

The Supreme Court has consistently held that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (*citing United States v. Cronic*, 466 U.S. 648, 657, n. 20 (1984); *Strickland v. Washington*, 466 U.S., at 693-696).

The State of Texas has likewise recognized that the failure of direct appeal counsel to raise a single meritorious claim constitutes ineffective assistance of counsel. In *Ex parte Miller*, the Court of Criminal Appeals explained that "[t]o show that appellate counsel was constitutionally ineffective for failing to assert a

particular point of error on appeal, an applicant must prove that (1) counsel's decision not to raise a particular point of error was objectively unreasonable, and (2) there is a reasonable probability that, but for counsel's failure to raise that particular issue, he would have prevailed on appeal." *Ex parte Miller*, 330 S.W.3d 610, 623 (Tex. Crim. App. 2009) (citing *Smith v. Robbins*, 528 U.S. 259, 285-86 (2000)). While recognizing that an attorney "need not advance every argument," the Court of Criminal Appeals explained that "if appellate counsel fails to raise a claim that has indisputable merit under well-settled law and would necessarily result in reversible error, appellate counsel is ineffective for failing to raise it." *Id.* at 623-24. Stated another way, there can be no plausible strategy for an appellate attorney's failure to raise "a 'lead pipe cinch' point of error" on direct appeal. *Id.* at 624-25; *see also United States v. Reinhart*, 357 F.3d 521, 525 (5th Cir. 2004) ("Solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention."); *Ex parte Flores*, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012), reh'g denied (Jan. 16, 2013) ("[I]f 'appellate counsel fails to raise a claim that has indisputable merit under well-settled law and would necessarily result in reversible error, appellate counsel is ineffective for failing to raise it.'"); *Ex parte Daigle*, 848 S.W.2d 691, 692 (Tex. Crim. App. 1993) (granting a reversal where appellate counsel failed to raise a single appellate issue when "reasonable appellate counsel would have raised this issue on appeal, and there was a reasonable probability that a different outcome would have resulted.").

Because there is a reasonable probability that Davila's conviction would have been overturned had the jury charge issue been raised on appeal, appellate counsel was ineffective for failing to raise a claim related to the improper jury charge.

IV. Contemporaneously Filed Motion to Stay and Abey

Davila recognizes that this claim was not presented to the state courts; thus, he is filing a motion related to his requested Stay and Abeyance along with the filing of this Amended Writ. Davila will only briefly introduce the issue here and respectfully direct this Court to his motion for a full explanation of his argument.

Federal precedent has firmly established that federal district courts should not entertain unexhausted claims raised in writs of habeas corpus. *See Rose v. Lundy*, 455 U.S. 509 (1982). This idea is based on the "interests of comity and federalism [which] dictate that state courts must have the first opportunity to decide a petitioner's claims." *Rhines v. Webber*, 544 U.S. 269, 273 (2005). However, this doctrine was established in the era before AEDPA was enacted when there was no statute of limitations for the filing of federal habeas petitions. *Id.* at 274. With the enactment of AEDPA came the strict one-year statute of limitations on the filing of federal petitions. 28 U.S.C. § 2244(d).

In *Rhines*, the Supreme Court recognized the difficulty faced by petitioners when trying to balance the

effect of the exhaustion requirement on one hand with the short statute of limitations on the other. After discussing the goals of AEDPA and the role of habeas corpus in general, the Court decided that it is proper for district courts to stay and abey federal writs so that unexhausted claims can be presented to the state courts in limited circumstances. *Rhines*, 544 U.S. at 277. The Court decided that it was proper to stay and abey a petitioner's claims when: (1) "the district court determines there [is] good cause for the petitioner's failure to exhaust his claims first in state court," (2) the unexhausted claims are potentially meritorious, and (3) "there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Id.* at 277-78 (2005).

The Supreme Court has identified at least three objective impediments to compliance with a procedural rule: (1) interference by officials that makes compliance impractical, (2) a showing that the factual or legal basis for the claim was not reasonably available, and (3) the procedural default was the result of ineffective assistance of counsel, viz., failing to properly preserve a federal constitutional claim for review in state court. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986).

The Supreme Court held many years ago that ineffective assistance of counsel is cause for a procedural default. *Id.* at 488; *see also Collins v. Waller*, 121 F. App'x 50, 51 (5th Cir. 2005) (not designated for publication) ("Ineffective assistance of counsel can constitute cause for a procedural default."). As Davila's state appellate counsel was ineffective for failing to identify

and raise this issue on appeal, Davila has established cause for his failure to raise this issue below. This Court should grant his pending motion to stay and abet [sic] so that the state courts have an opportunity to address this issue.

V. The Supreme Court's recent opinion in *Trevino v. Thaler* applies straightforwardly to the case *sub judice*

Recently, in *Trevino v. Thaler*, the Supreme Court held that the holding of *Martinez* applies to Texas:

> [A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013) (quoting *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012)).

Davila submits that his state habeas counsel was ineffective for failing to present this claim in his state writ of habeas corpus. State writ counsel's deficient performance will be discussed below, in Claim of Error Four.

CLAIM FOUR: State Habeas Counsel Rendered Ineffective Assistance Counsel

I. Introduction and Core Legal Principles

Recently, in *Trevino v. Thaler*, the Supreme Court held that the holding of *Martinez v. Ryan* applies to Texas:

> [A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Trevino v. Thaler, 133 S. Ct. 1911, 1921 (U.S. 2013) (citing *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012)). To show his ineffectiveness claims are substantial, a petitioner "must demonstrate that the claim[s] ha[ve] some merit," *Martinez*, 132 S.Ct. at 1318.

Once again, there are two elements to an ineffectiveness claim: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (2003).

Davila submits that his state habeas counsel, David Richards, was ineffective for failing to subpoena any of the witnesses (other than Toni Knox) to testify

at the state writ hearing. 2 Writ RR 3. He was further ineffective for failing to gain anything more than a passing familiarity with the facts, hoping instead to "wing it" by parroting Ms. Knox's report. 2 Writ RR 148-50. Indeed, Richards managed to put all of one sentence about Ms. Knox's report in the state writ (which was the sum total of argumentation regarding the actual facts of Davila's case). Writ CR at 16. While Davila is grateful for the report submitted by Toni Knox in his case, which identified evidence from multiple sources of his horrendous childhood that was never uncovered by his trial counsel, he believes Richards was ineffective in presenting this evidence to the state habeas court.

To add to his ineffectiveness, rather than raising the ineffective appellate counsel claim, *see* Claim Three, Richards included two claims that were "not cognizable on habeas review." *See Ex Parte Davila*, WR-75,356-01, 2013 WL 1655549 (Tex. Crim. App. 2013). It is simply amazing that Richards completely failed to identify the fact that appellate counsel had overlooked the strongest appellate issue in Davila's case. *See* Claim Three.

II. Richards' performance was unreasonable based on the prevailing norms for capital habeas counsel.

A. Professional Standards

The State Bar of Texas, in its published Guidelines for Texas Capital Counsel, includes the "Duties of

Habeas Corpus Counsel."[10] The Guidelines identified one duty as follows:

> Habeas corpus counsel cannot rely on the previously compiled record, but must conduct a thorough and independent investigation. Specifically, habeas counsel cannot rely on the work of, or representations made by, prior counsel to limit the scope of the post-conviction investigation. Counsel must not assume that the trial record presents either a complete or accurate picture of the facts and issues in the case.

Id. at 30. Further, the State Bar's Guidelines declared that state habeas counsel has a "duty to conduct a searching inquiry to assess whether any constitutional violations may have taken place." *Id.*

The American Bar Association agrees. According to the ABA Guidelines for capital defense,[11] "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." Guideline 10.7(A); http://ambar.org/2003Guidelines at 968. The ABA Guidelines emphasize this point: "Counsel at every stage have an obligation to conduct a full examination of the defense

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[10] *Guidelines and Standards for Texas Capital Counsel*, State Bar of Texas, at 30; adopted April 21, 2006; available at: http://www.texasbar.com/Content/NavigationMenu/ForLawyers/Committees/TexasCapitalGuidelines.pdf

[11] *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, American Bar Association, revised February 2003.

provided to the client at all prior phases of the case." *Id.*, Guideline 10.7(B). And of particular significance to Davila's case: "As with every other stage of capital proceedings, collateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues." *Id.* at 1086, Commentary to Guideline 10.15.

Finally, the ABA Guidelines require that counsel "evaluate each potential claim in light of . . . the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited." *Id.* at 1028, Guideline 10.8 ("The Duty to Assert Legal Claims"). The reasoning behind this last mandate is made abundantly clear: "One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial." *Id.* at 1030, Commentary to Guideline 10.8.

Unfortunately for Davila, his state writ attorney did not abide by these professional norms.

B. State habeas counsel's performance as to the *Wiggins* claim.

Erick's state writ started with a whimper, as the state habeas counsel, David Richards, allowed the

deadline for filing the writ to pass without filing a writ or requesting an extension. Writ CR at 358-60. Luckily, the Court of Criminal Appeals allowed Richards an additional 180 days from March 2, 2011, to file the writ. Writ CR at 361-62. Richards used all of his additional time to draft his 18-page state writ, which was filed on August 29, 2011. Writ CR at 2-20. The first six pages of that writ consisted of title pages, identity of the parties, a table of contents and authorities, and the grounds presented. Writ CR at 2-7. The next three pages consisted of a brief factual recitation. A whopping five pages were devoted to the *Wiggins* claim, which merely referenced the attached mitigation report compiled by Toni Knox. Writ CR at 11-16. The final two claims were presented in a single paragraph that extended over two pages. Writ CR at 17-19.

Quite simply, the scant, untimely writ submitted by state writ counsel Richards is proof in itself of his failure to abide by the professional norms established for habeas counsel in capital cases. Had writ counsel not attached the thorough mitigation report compiled by Toni Knox, which luckily was sworn to and included sworn affidavits from multiple valuable mitigation witnesses the trial team never contacted, then it is entirely possible the state writ would not have preserved any issues for federal review. A review of the state writ shows that Richard's did little more than file a boilerplate writ, to which he attached the report compiled by his able mitigation specialist.

C. The state writ hearing, a squandered opportunity.

State writ counsel's performance at the state writ hearing was also deficient. First, it should be noted that writ counsel failed to call any of the witnesses identified by Toni Knox. Had these witnesses been called, the state district judge would have heard live testimony establishing that Davila suffered tremendously during his childhood, and that the evidence of his suffering was never discovered by his trial team. 2 WRR 1-153; Writ CR at 146-174 (A review of Knox's report and the record of the writ hearing shows that none of the witnesses she discovered were called to the hearing). Second, he failed to call members of the defense team to establish which person played which role in Davila's defense. For example, he did not bother to call Dr. Goodness, whose report made it clear that she was told "Dr. Fallis would be conducting the larger mitigation investigation, including collateral interviews, and documenting his social history." Writ CR at 26. This of course is in conflict with trial defense attorney Keene's testimony that it was the defense attorney's themselves who investigated the mitigation case. 2 WRR at 96101.

The effects of not calling the witnesses to the hearing was no doubt compounded by the fact the State Writ hearing judge did not have a copy of the appendixes to Toni Knox report prior to the hearing date. *Id.* at 7-8.

A review of the writ hearing testimony shows that Davila's counsel hardly asked any substantive questions of his sole witness, Toni Knox. *Id.* at 11-40. Indeed, rather than have Toni Knox explain to the court, in person, exactly what new evidence was uncovered, he simply asked her if "those affidavits were attached as appendices to your report." *Id.* at 27.

By failing to call the newly discovered witnesses to the writ hearing, state writ counsel passed up the best opportunity to persuasively get the missing information before the state trial court, the Texas Court of Criminal Appeals, and this Court.

D. Writ Counsel failed to identify and raise a claim related [sic] the improper jury instructions.

In Claim Three, Davila explained that his direct appeal counsel was ineffective for failing to identify and raise an issue related to the improper transferred intent instruction given during trial. He incorporates that argument here. Although appellate counsel's failure to raise this claim is sufficient cause to excuse a procedural default, *Murray v. Carrier*, 477 U.S. 478, 488, (1986); *see also Collins v. Waller*, 121 F. App'x 50, 51 (5th Cir. 2005) (not designated for publication) ("Ineffective assistance of counsel can constitute cause for a procedural default"), Davila believes the issue can also be identified under the *Trevino* line of cases. Of course, had this issue been raised by state writ counsel,

Davila would have been granted a new appeal to challenge the improper instruction given in his case. *Ex parte Miller*, 330 S.W.3d 610, 626 (Tex. Crim. App. 2009).

E. Writ counsel's failure to investigate Davila's drug use.

According to an expert hired by the trial defense team, Dr. Goodness, Erick Davila was diagnosed with severe Polysubstance Abuse. *See* Writ CR at 87. This no doubt explains the fact, discovered by Toni Knox, that Davila began smoking marijuana at an early age, and by the age of 20 Davila "was using Ecstasy and Methamphetamines heavily." *Id.* at 88. Erick was taking ecstasy as many as five to six times a day by the time of the shooting. *Id.* Indeed, Garfield Thomas, Davila's codefendant, gave a recorded interview with the local news in which he confirmed that Davila was on drugs at the time of the shooting. A copy of this interview is currently in the possession of the Tarrant County District Attorney's Office, and Davila has requested a copy and will supplement the record with a copy once he receives it.

However, because of habeas counsel's complete failure to gain a familiarity with his own investigator's report, or with the underlying facts of this case, no one has ever considered how Davila's drug use might have affected his perceptions on the night of the shooting (including how it diminished his well-documented extremely poor ability to see at far distances), or how the

drug use might have fit into the overall mitigation scheme.

F. Possible reasons for writ counsel's deficient performance.

Toni Knox has prepared an affidavit related to her experience working with Attorney David Richards during the state proceedings. *See* Exhibit "B" attached. In that affidavit she explains that "Mr. Richards' health was not good as I believe he had been in a car accident and had suffered a stroke or several strokes before the writ hearing. I know at one point he had to move his office because he was unable to manage the stairs and was using a cane." *Id.* at 3. In Ms. Knox opinion, "Mr. Richards' physical impairment affected his ability to prepare tor this hearing, or to understand the underlying facts to be presented."

Knox also explains the preparation for the writ hearing:

> David Richards did not contact me about this hearing until sometime late in June 2012 and I was concerned about my testimony. We scheduled a phone call to discuss my testimony on June 24th, which was a Sunday. When Mr. Richards and I started talking he did not have a copy of my affidavit, so the phone call was not very meaningful. He started looking through his papers and realized that his assistant and had not given him a copy. I told him that I would email him a copy and I believe I did but this meant he only

> had the time to read over the affidavit and then call me back. We really did not discuss the hearing or my affidavit in any detail. I was very anxious as I did not feel I or Mr. Richards was prepared for the hearing. It felt as though we were just "going through the motion" of showing up for the hearing. I had no expectations that anything positive would come from the hearing.
>
> I met with Mr. Richards about this report exactly one (1) time before the hearing. We met on July 2, 2012 prior to the hearing Mr. Richards and I only met for about an hour. We met in the courtroom in the attorney's conference type room and we spent very little time discussing my testimony. The Tarrant County DA came in and wanted copies of my interviews and other information. I spent time trying to get that information to them and David sent his assistant to get him some lunch. Since the DA was present in the conference room trying to get my records, we really did not have much time to discuss the hearing.

Id. at 2.

Knox went on to explain that "[b]oth before and after this meeting, Mr. Richards was generally unfamiliar with the contents of my report," and to her knowledge, "Mr. Richards made no effort to bring any of the people identified in the report as potential witnesses to testify at the writ hearing." *Id.*

G. State writ counsel's failed [sic] to render constitutionally effective representation.

When one views David Richards' representation of Davila through the lens of the guidelines established by the Texas State Bar and the American Bar Association, it is painfully obvious that Davila's state writ counsel was ineffective. Luckily, he did take a step in the right direction by hiring a mitigation specialist, and by attaching the specialist's report to the writ he prepared. However, that seems to be the extent of work. As state writ counsel failed to provide effective representation for his client, establish [sic] has shown cause for a default related to the claims found in his *Wiggins* claim, his ineffective assistance of appellate counsel claim, and his *Brady* claim.

III. Davila's underlying ineffectiveness claims have merit.

First, it should be stated that Davila believes that the information provided by Toni Knox in the form of affidavits from family members was sufficiently presented to the state habeas court so that the information should have been taken into account. However, to the extent that the state court refused to give weight to those affidavits, prejudice is demonstrated by showing, *supra*, that the state district court rejected Davila's IAC claims because the family members quoted in Knox's report were not asked to give live testimony. By failing to present the live testimony of the persons identified by Knox, Richards failed to show the

trial court the depth of mitigating evidence that the trial team failed to discover. To the extent Richards' deficient performance prevents this Court from considering the powerful mitigation evidence uncovered by Toni Knox, Richards' deficient performance should [sic] been seen as cause for Davila's failure to present live testimony below, and this Court should be able to take the powerful mitigation evidence into account.

Further, Richards failed to present to the Texas court Davila's ineffective assistance of appellate counsel claim. As Davila has already explained, had that claim been presented to the state courts, there is a great probability that he would have been granted a new trial.

VI. [sic] How to Proceed?

While the Supreme Court's analysis in *Trevino* clearly grants this Court the authority to review procedurally defaulted claims that were not raised as a result of habeas counsel's ineffectiveness, the Supreme Court did not provide guidance on how this Court should proceed. Davila asserts there are two options: stay the current proceedings and allow Davila to return to the state court, or review these claims de novo. As will be further discussed in the contemporaneously filed Motion to Stay and Abey, Davila believes this court should stay the current proceedings and allow Texas the chance to pass upon these claims.

CLAIM FIVE: The Trial Court erred in overruling Davila's motion to suppress his three written statements admitting to the commission of the offense of capital murder pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

CLAIM SIX: The Trial Court erred in overruling Davila's motion to suppress his statement admitting to the commission of an extraneous murder offense pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978) in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

Exhaustion: These Claims were raised as points of error three and five in Davila's Direct Appeal to the Court of Criminal Appeals. They were addressed on their merits by that Court. *See Davila v. State*, AP-76,105, 2011 WL 303265 (Tex. Crim. App. 2011).

During the suppression hearing, defense counsel played for the trial court an audio recording of Detective Johnson's interview with April Coffield. 16 RR 195, 204-230. On the recording, Coffield can be heard stating that she never saw the shooter's face on the night in question. 16 RR 231; *see also* Def.'s Ex. 89 at 6 ("I didn't see no face or nothing.").

This conflict between the recorded interview of Coffield (wherein she states she did not see Davila's

face) and Johnson's warrant affidavit (where he states that Coffield did recognize Davila as the shooter) amounts to "a reckless disregard for the truth" that renders Johnson's affidavit inadequate to supply probable cause for Davila's arrest.

I. Fourth Amendment protections and *Franks v. Delaware*

The Fourth Amendment to the United States Constitution, coupled with the Due Process Clause of the Fourteenth Amendment, is the bulwark protecting all American citizens from unreasonable searches and arrests or seizures:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Code of Criminal Procedure delineates the prerequisites necessary to render an affidavit for an arrest warrant, or a complaint under Texas jurisprudence, sufficient. Tex. Code Crim. Proc. art. 15.05. Section 2 of Article 15.05 reads as follows: "It must show that the accused has committed some offense against the laws of the State, either directly or that the affiant has good reason to believe, and does believe, that the accused has committed such offense."

Incumbent in the evaluation of the sufficiency of the complaint is that the information contained within and sworn to by the affiant is credible and truthful. This very issue was addressed by the Supreme Court in *Franks v. Delaware*, 438 U.S. 154 (1978). Specifically, the *Franks* Court held:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavits false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id. at 155-56.

Justice Blackmun further explicated *Franks* Court's holding:

> "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." This does not mean "truthful" in the sense that every

> fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Id. at 164-65 (quoting the language of Judge Frankel in *United States v. Halsey*, 257 F.Supp. 1002, 1005 (S.D.N.Y. 1966) (unreported)).

II. The Trial Court heard Davila's Motion to Suppress on Day Sixteen

Judge Wilson took up Davila's motion to suppress on [sic] sixteenth day of trial, February 12, 2009. 16 RR 204. The first half of the suppression hearing trained on the validity of the warrant; the second half trained on Davila's statements. 16 RR 246 (testimony of Detective Brent Johnson).

Detective Johnson prepared and swore to the probable cause affidavit used to obtain the warrant for Davila's arrest. *Id.* Those paragraphs in Detective Johnson's affidavit regarding the information that April Coffield provided read as follows:

> April Coffield was near the party at 5758 Luther Ct., visiting a cousin. I interviewed Coffield. Coffield saw what she believed to be a green Ford Focus drop a black man off in the 5700 block of Luther Ct. Coffield saw the man

run toward the four bedroom town home at the corner of Anderson. Coffield saw a red dot on the ground while the man was running.

. . .

Coffield stated that she heard shots fired as did Charlene Ogierumwense. *Coffield ran into a house then peeked out.* Coffield saw the man, who got out of the car on Luther Ct., standing in front of the apartment where the children's birthday party was in progress. He was holding a rifle. Coffield then saw the man fire into the apartment. The man fled on foot. Ken Reid [sic] saw the car that dropped off the man speed away from the scene. A man came out of the apartment at 5701 Anderson. The man was "hollering". Coffield recognized that there was trouble. Coffield went into the apartment in an attempt to help. In the apartment Coffield saw people who appeared to have been shot . . .

. . .

Detective F. Serra III 2167 prepared photospreads containing Davila and five other black males of similar physical characteristics. Detective Boetcher and I showed the photospreads to witnesses. Ken Reid [sic] immediately picked Davila as the man he saw carrying the rifle from Luther Ct. Reid [sic] told me that he saw Davila's face under a street light. April Coffield looked at the photospread. She seemed nervous at first. She put her finger on Davila and said she saw him once. Detective Boetcher asked her about

> Davila. Coffield admitted to Detective Boetcher that she has seen Davila at least a dozen times. *Coffield then said that Davila was the man she saw running with a rifle and that Davila was the man she saw shoot into the apartment where Oueshawn* [sic] *and Annette Stevenson were killed.*

24 RR 2-4; State's Ex. 117 (emphasis added).

Johnson further testified at the suppression hearing that this information had been obtained from Ms. Coffield during a recorded interview conducted the day after this offense. A transcription had been made of her interrogation. However, Detective Johnson conceded that Ms. Coffield had emphasized that she had not seen the face of the shooter. 34 RR 6; *see also* State's Ex. 117. Moreover, at no time did she inform him that she had run into a house while the shooting was in progress and then "peeked out," as he detailed in his affidavit. Detective Johnson's testimony in pertinent part is as follows:

> BY MR. FORD [Defense counsel]:
>
> Q. Detective Johnson, so were you able to listen to that recording?
>
> A. Yes.
>
> . . .
>
> Q. So at some point when you made it, you heard what April Coffield was saying to you while you were recording it?
>
> A. Yes.

Q. And you're aware, sir, that she told you she did not see the face of the man doing the shooting? That's a "yes" or "no."

A. She said she didn't see faces, but we clarified it, I believe. I couldn't understand that part of the tape, part of the recording.

. . .

Q. (BY MR. FORD) I'm going to show you page 6 of 9 of what has been admitted into evidence. Your question is: Okay. How – how did you see – would you recognize him again?

Coffield: I didn't see no face or nothing. I just seen. [sic].

So she says there, "I didn't see no face"?

A. Yes.

Q. And sir, you're a detective. You have to see a face in order to recognize somebody, correct?

A. Correct.

Q. And your affidavit, if you turn to your arrest warrant affidavit, you put a line in your arrest warrant affidavit that Coffield said that Davila was the man she saw running with a rifle and that Davila was the man she saw shoot into the apartment.

That's – is that correct?

A. Yes. Can I see the affidavit? Yes, that's – yes, that's correct.

Q. And yet you have a transcript, and she didn't see the shooter's face?

A. But I clarified that. Later, that one small place she said that she hadn't seen no faces or nothing. Very general statement. But I clarified that. I asked her if – I went back and said, "But you told me it was Big Truman."

And let me see, where did it go? And I said, "Did you see Big Truman or not?" "It was not. It was somebody else shooting," da, da, da.

And then when she finally clarified it was not Big Truman . . .

In the – in the transcript we go through a complete description of it where she describes his face, his beard color, his skin color, his hair. She convinced me that she had seen him. I mean, that one small part taken out of context, sure, she said that. But she went back and she described the guy she saw shooting.

Q. She gave a general description in general terms, correct? Weight, height?

A. Skin Color.

Q. Skin color?

A. Beard color.

Q. And she said –

A. Hair style.

Q. And she said he had short braids?

A. Correct.

Q. She didn't say, I recognize his face?

A. She did not use those words, no.

16 RR 230-33.

III. These Inaccuracies Undermine the Warrant

A. False Statement

It is without question that the information that Detective Johnson inserted into his probable cause affidavit regarding Ms. Coffield's alleged identification of Davila as the shooter was false. *See generally United States v. Reinholz*, 245 F.3d 765 (8th Cir. 2001) (where allegation in search warrant affidavit was that "a confidential and reliable source" and defendant were involved in the use of methamphetamine, this was a false statement because it "implied that [the affiant's] source has knowledge of Reinholz's drug activities and that independent police investigation corroborated the informant's declarations" when in fact source was pharmacist whose opinion [sic] based only on defendant's purchase of iodine crystals.).

Coffield had stressed to him that she did not see the shooter's face. She also never mentioned "peeking out" of a house during the shooting. Therefore, Detective Johnson's inclusion that she had identified Davila as the culprit was untrue.

B. Reckless Disregard for Truth of Statements Made by Affiant Johnson

At a minimum, this also proves that Detective Johnson had a reckless disregard for the truth when he drafted his affidavit. *See United States v. A Residence Located at 218 Third Street, New Glarus, Wis.*, 805 F.2d 256 (7th Cir. 1986) (finding that an affiant acted with reckless disregard for the truth where he 'in fact entertained serious doubts as to the truth of' his allegations, adding that "[r]eckless disregard for the truth may also be proved inferentially from circumstances evincing obvious reasons to doubt the veracity of the allegations"); *United States v. Garcia-Zambrano*, 530 F.3d 1249 (10th Cir. 2008) (finding "reckless disregard" when officer's oral report to detective was either inaccurate or misunderstood); *United States v. West*, 520 F.3d 604 (6th Cir. 2008) (finding "reckless disregard" in reporting informant's accusation of defendant's drunken confession to murdering missing person and placing body in certain well, but failing to report that all efforts at corroboration had failed notwithstanding specific detail of story); *United States v. Davis*, 471 F.3d 938 (8th Cir. 2006) (holding that a statement that the firearms were in 'plain view' was made in reckless disregard of the truth where, in actuality, firearms were found by the "opening of a closet padlocked from the outside during a sweep to look for potential accomplices").

To repeat, nowhere in her interview did Coffield specifically identify Davila as the person who committed this offense. If Coffield's spurious identification of

Davila is excised from the affidavit, and the remaining "four corners" are analyzed, there is dangerously little to connect Davila to this crime.

C. Material Omission

Detective Johnson did include information from Kent Reed in which he identified Davila as carrying a rifle, but nowhere in the affidavit did Kent identify Davila as the shooter. 34 RR 4; Def.'s Ex. 89. "The reasoning of *Franks* logically extends to material omissions." 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 4.4(b), at 688 (5th ed. 2012).

IV. Conclusion

By permitting the State to offer the three statements in the guilt/innocence phase of Davila's trial and the fourth statement in the punishment phase, the trial court violated Davila's federal Constitutional rights.

CLAIM SEVEN: The Trial Court erred in overruling Davila's motion to suppress his three written statements admitting to the commission of the offense of capital murder pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

CLAIM EIGHT: The trial court erred in overruling Davila's motion to suppress his statement admitting to the commission of an extraneous murder offense pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Exhaustion: These claims were raised as points of error seven and nine in Davila's direct appeal to the Court of Criminal Appeals. They were addressed on their merits by that Court. *See Davila v. State*, AP-76,105, 2011 WL 303265 (Tex. Crim. App. 2011).

The Supreme Court in its landmark decision of *Jackson v. Denno*, 378 U.S. 368 (1964) espoused the now renown proposition that the Government's use of coerced confessions obtained pursuant to custodial interrogation against those persons at their trial violates the fundamental constitutional guarantee of due process of law. The Court explained:

> It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession,

> *Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760, and even though there is ample evidence aside from the confession to support the conviction. *Malinski v. New York*, 324 U.S. 401, 65 S.Ct. 781, 89 L.Ed. 1029; *Stroble v. California*, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872; *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession.

Id. at 376-77.

Texas courts have explained that the State's use of both oral and written statements obtained pursuant to custodial interrogation are not admissible against an accused unless the state can demonstrate by a preponderance of the evidence that certain procedural safeguards were taken to protect a defendant's constitutional right against self-incrimination. *See, e.g.*, *Thai Ngoc Nguyen v. State*, 292 S.W. 3d 671, 677 (Tex. Crim. App. 2009); *State v. Gobert*, 275 S.W.3d 888, 892-93 (Tex. Crim. App. 2008). "Custodial interrogation" is legally defined as questioning initiated by law enforcement officers after an accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v Arizona*, 384 U.S. 436, 444 (1966).

I. Davila Was Interrogated for Seven Hours

At Davila's trial it was established that he was present in custodial interrogation for seven hours. 14 RR 283-85. During this seven-hour period, Davila did not ask to use the restroom and was not given anything to eat or drink. *Id.* According to Detective Johnson, Davila never asked for anything to eat or drink, however he testified he had offered Davila food or liquids. *Id.* He did not put anything about the offer in his notes. *Id.*

II. Every Factor In the *Schneckloth* Test Militates in Favor of a Finding of Involuntariness

A. A Defective Warrant Vitiates Any Finding of Consent

All four written statements given by Davila were obtained as a result of custodial interrogation. Davila had been formally placed under arrest pursuant to an arrest warrant. If this warrant is found to be defective (see Claims Five and Six, *supra*), then Davila's statements were involuntary *vel non*. "A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid." *Bumper v. North Carolina*, 391 U.S. 543, 549 (1968).

B. No Reasonable Jurist Could Reach the CCA's Conclusion As To Coercion and the Lack of Valid Consent Because of Davila's Physical Condition (Hunger and in Need of Using Restroom)

"While it is unlikely that a single coercive element will, standing alone, be enough to invalidate a consent, several of them in combination will. Moreover, in a case otherwise close on the question of consent, the presence of a single coercive element may well be enough to tip the scales." 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, §8.2(b), p. 81 (5th ed. 2012).

Davila was subjected to interrogation for approximately seven hours without receiving any food or water, and without going to the restroom. "There is general agreement that custody makes the prosecution's burden particularly heavy." *Id.* at 85. Davila contends that this is all the more so when a man is made to sit an entire day without food or drink or using the restroom.

C. Impairment of the Excretory Function is Functionally Identical to Denial of Medical Care

First, the interrogation lasted seven hours. *See State v. Vinick*, 398 N.W.2d 788 791 (Iowa 1987) (defendant's confession was involuntary when given in response to police questioning and defendant "was not alert and capable of giving meaningful answers to

questions during the ***six hours*** . . . " (emphasis added)).

Second, using the restroom is the simplest form of medical treatment imaginable. *See Furgeson v. City of Charleston*, 308 F.3d 380, 403 (4th Cir. 2002) ("The physical strain of labor, birth, or serious illness will have a deleterious effect on the mental process, limiting ability to rationally consider whatever choices he has.").

III. Conclusion

No reasonable jurist could conclude that the custodial statements given by Davila were born of valid consent.

CLAIM NINE: The Trial Court Erred In Overruling Davila's Motion to Preclude the Death Penalty As A Sentencing Option and Declare Tex. Crim. Proc. Code 37.071 Unconstitutional On the Grounds That Texas Law Allows For A Death Sentence Without Grand Jury Review of the Punishment Special Issues in violation of the Fifth and Fourteenth Amendments

Exhaustion: This Claim was raised as point of error twelve in Davila's direct appeal to the Court of Criminal Appeals. It was addressed on its merits by that Court. *See Davila v. State*, AP-76,105, 2011 WL 303265 at 12 (Tex. Crim. App. 2011).

The grand jury in Davila's case was called upon to determine whether probable cause existed to believe that he murdered Queshawn and Annette Stevenson; however, the grand jury, pursuant to Texas law, was not required to weigh (and therefore did not weigh) the special punishment issues. CR at 2-3.

The Fifth Amendment to the United States Constitution demands that no person be held to answer "for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V; *Jones v United States*, 526 U.S. 227, 243 n. 6 (1999). The Fifth Amendment thus requires that a defendant charged with a felony offense be given notice by indictment of the charges against him.

Likewise, the [sic] both the Fifth and Fourteenth Amendments to the United States Constitution forbid the government from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. amends. V; XIV.

In *United States v. Robinson*, the Fifth Circuit considered the issue of whether aggravating factors that render a defendant eligible for the death penalty must be alleged in the indictment. 367 F.3d 278, 294 (5th Cir. 2004). Relying on the Supreme Court's decision in *Ring v. Arizona*, the court in *Robinson* held that the Fifth Amendment demands that aggravating factors that render a particular defendant eligible for the death penalty are, in fact, elements of the offense. *Id.* Therefore, the government is required to charge, by indictment, those statutory aggravating factors that it

intends to prove at trial and render a defendant eligible for the death penalty. *Id.* Thus, the government's failure to do so was constitutional error. *Id.*; *accord United States v. Allen*, 357 F.3d 745, 748 (8th Cir. 2004) (aggravating factors essential to qualify a particular defendant as death eligible must be alleged in the indictment). *See also United States v. Higgs*, 353 F.3d 281, 298 (4th Cir. 2003) (recognizing that death eligibility factors are the "functional equivalent of elements of the capital offenses and must be charged in the indictment, submitted to the petit jury, and proved beyond a reasonable doubt").

The Texas Code of Criminal Procedure sets out the two "factors" that the jury must consider in a case in which the state has chosen to seek the death penalty. Tex. Code Crim. Proc. art 37.071. However, these factors are not presented to or passed on by the grand jury that returns the indictment. In light of recent Supreme Court jurisprudence, there is only one logical inference to be drawn: the aggravating and mitigating "factors" that a Texas jury must consider in the sentencing phase of a capital trial are, in fact, elements of the offense that must be alleged in the indictment and proven beyond a reasonable doubt. *See, e.g.*, *Ring*, 536 U.S. at 602, 12 S.Ct. at 2439.

As it presently stands, the Texas statutory scheme permits the state to bypass the grand jury indictment process and to arbitrarily determine which defendants it deems are "death worthy." This provision runs afoul of the Due Process Clause of the Fifth Amendment and

the due process rights guarantees set forth in the Fourteenth Amendment to the United States Constitution. It not only defies logic, but also federal criminal jurisprudence, to permit a state statutory provision to circumvent the Fifth Amendment and afford its citizens fewer protections than those provided to citizens charged with a federal offense. The protections afforded by the Fifth Amendment to citizens charged with a federal offense must likewise be extended to citizens charged with state offenses. Thus, in light of recent Supreme Court jurisprudence, the Texas statutory scheme, which permits the State to seek the death penalty in any given case – independent of and subsequent to the return by a grand jury of the underlying indictment – is constitutionally impermissible. *See, e.g.*, *Jones*, 526 U.S. at 232, 119 S. Ct. at 1219.

I. The Court of Criminal Appeals' decision.

The Court of Criminal Appeals (CCA), in reaching its decision on this claim, recognized that federal jurisprudence has established "that a federal indictment charging a defendant with capital murder must allege the aggravating factors that render a defendant eligible for the death penalty in the indictment." *Davila v. State*, AP-76,105, 2011 WL 303265 (Tex. Crim. App. 2011). However, the CCA believed the federal precedent to be inapplicable because the "federal constitutional right to indictment in a felony case does not apply to the states." *Id.* (citing *Albright v. Oliver*, 510 U.S. 266, 272 (1994)). Further, the CCA mistakenly believed that "the indictment in this case did allege the

aggravating factors that elevated this case from a murder charge under Section 19.02 of the Texas Penal Code to capital murder – a murder that is eligible for imposition of the death penalty – under Section 19.03(a)(7)(A)."

The CCA's decision was contrary to clearly established federal law because it applied a rule contradicting the governing law established by the Supreme Court. In its holding, the CCA failed to recognize that the Majority of Justices in *Albright* actually agreed that "the Due Process Clause of the Fourteenth Amendment constrains the power of state governments to accuse a citizen of an infamous crime." *Albright v. Oliver*, 510 U.S. 266, 316 (1994) (Stevens, J., dissenting). Further, in determining that the indictment in this case alleged all aggravating factors necessary for a death sentence, the CCA failed to recognize clearly established Supreme Court precedent holding that any increase in a defendant's punishment, contingent on a finding of fact, is treated as an element of the offense. *See, e.g.*, *Ring v. Arizona*, 536 U.S. 584, 585-86 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.").

II. The capital sentencing scheme in Texas requires certain findings be made before an inmate may be sentenced to death.

In support of its decision that all necessary elements of capital murder were alleged in the indictment, the CCA stated that "the indictment in this case did allege the aggravating factors that elevated this case from a murder charge under Section 19.02 of the Texas Penal Code to capital murder – a murder that is eligible for imposition of the death penalty – under Section 19.03(a)(7)(A)." *Davila*, 2011 WL 303265 at 10. The court went on to explain that "[a]ny capital-murder charge under Section 19.03 makes a defendant eligible for the death penalty under Article 37.071 if the State seeks the death penalty in the particular case. The elements of capital murder alleged under Section 19.03 suffice to put the defendant on notice that the State may seek the death penalty." *Id.*

Texas Penal Code § 19.03 establishes multiple ways a person can commit capital murder. Relevant to Davila's Writ is the idea that a person commits capital murder if "the person murders more than one person during the same criminal transaction." Tex. Penal Code § 19.03(a)(7)(A). Importantly, a person convicted of a capital felony in which the state seeks the death penalty will be sentenced either to life in prison without parole, or to death. Tex. Penal Code § 12.31(a). Further, a sentence of death can only be imposed after the jury has answered two questions unanimously:

1. Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

2. Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

Tex. Code Crim. Proc. art. 37.071(b)(1), (e)(1). In order for a sentence of death to result, the jury must be convinced beyond a reasonable doubt that the answer to issue number one is "yes," and also answer issue number two "no." *Id.* at (c), (g). Restated, the death penalty cannot be handed down based solely on a conviction for capital murder; only after additional factors have been found, can a person be sentenced to death. *Id.*

A. The CCA failed to grasp that the sentencing questions are necessary elements for a death sentence.

By partly basing their decision on the notion that "[a]ny capital-murder charge under Section 19.03 makes a defendant eligible for the death penalty under Article 37.071 if the State seeks the death penalty in the particular case," the CCA failed to recognize that the Texas special issues are facts "that increase the

maximum penalty for a crime" and "must be *charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (citing *Jones v. United States*, 526 U.S. 227, 243, n. 6 (1999))

Apprendi dealt with a New Jersey statute permitting an enhanced sentence for persons who committed a "hate crime." *Id.* at 470. Under the statute, a judge could increase a defendant's punishment based on a judicial finding that an offense was indeed a "hate crime." *Id.* at 470-71. In striking down the statute, the Supreme Court first discussed its recent decision in *Jones v. United States*, where it "noted that 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 476 (2000) (citing *Jones*, 526 U.S. at 243, n. 6). The Court found that the "Fourteenth Amendment commands the same answer in this case involving a state statute." *Id.*

In reaching its ruling, the Court explained that traditionally a particular crime carried a particular sentence:

> Any possible distinction between an "element" of a felony offense and a "sentencing factor" was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our

> Nation's founding. As a general rule, criminal proceedings were submitted to a jury after being initiated by an indictment containing "all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, that the defendant . . . may be enabled to determine the species of offence they constitute, in order that he may prepare his defence accordingly . . . and *that there may be no doubt as to the judgment which should be given*, if the defendant be convicted." J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) (emphasis added). The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime. *See* 4 Blackstone *479 369-370 (after verdict, and barring a defect in the indictment, pardon, or benefit of clergy, "the court *must pronounce that judgment, which the law hath annexed to the crime.*" (emphasis added)).

Id. at 478-79. The Supreme Court reasoned that our founders expected people to understand the nature of punishment sought by the state based on the indictment brought against them. Thus, "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *Id.* at 490 (internal citation omitted).

Strangely, the Court also decided that the *Apprendi* decision did not affect its prior jurisprudence related to capital sentencing. *Id.* at 496-97. However, the Court changed its mind in *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring*'s holding was straightforward:

> *Apprendi's* reasoning is irreconcilable with *Walton's* holding in this regard, and today we overrule *Walton* in relevant part. Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

Ring v. Arizona, 536 U.S. 584, 589 (2002). *Ring*'s discussion of Arizona's capital scheme makes it clear that the Texas special issues, regardless of the CCA's impression, are facts that increase a defendant's maximum punishment.

The Court described Arizona's capital system:

> The State's first-degree murder statute prescribes that the offense "is punishable by death or life imprisonment as provided by § 13-703." Ariz.Rev.Stat. Ann. § 13-1105(C) (West 2001). The cross-referenced section, § 13-703, directs the judge who presided at trial to "conduct a separate sentencing hearing to determine the existence or nonexistence of [certain enumerated] circumstances . . . for the purpose of determining the sentence to be imposed." § 13-703(C) (West Supp.2001). The statute further instructs: "The hearing shall be conducted before the

> court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state." *Ibid.*

Id. at 592. Before a death sentence can be imposed, the state judge must find at least one aggravating circumstance and find there are no mitigating factors sufficient to warrant a death sentence. *Id.* at 593. Just like Texas' system, Arizona's statutory scheme permits death based on an indictment for first degree murder, but the death sentence can only be imposed after certain factors are found. In both Texas and Arizona, "[b]ased solely on the jury's verdict finding [a defendant] guilty . . . the maximum punishment he could have received was life imprisonment." *Id.* at 597.

The Supreme Court went on to hold that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494, n. 19). For the same reason, Texas' enumerated special issues are the functional equivalent of an element of a greater offense and should be included in the indictment passed upon by a grand jury.

III. The CCA failed to recognize that the grand jury requirement applies with equal force to the states.

In *United States v. Robinson*, the parties and the Fifth Circuit all agreed that an indictment that fails specifically to charge the aggravating factors that render a defendant eligible for the death penalty is constitutionally deficient. 367 F.3d 278, 281 (5th Cir. 2004). This follows the *Apprendi* Court's affirmance of the well-established principle that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi*, 530 U.S. at 476. The CCA nevertheless believed that "[t]he federal constitutional right to indictment in a felony case does not apply to the states." *Davila v. State*, 2011 WL 303265 at 10 (citing *Albright v. Oliver*, 510 U.S. 266, 272 (1994)).

However, the CCA misinterpreted *Albright*. *Albright* merely held that where a particular Amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing" such a claim. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (citing *Graham v. Connor*, 490 U.S. 386, 395). The Supreme Court in *Albright* ruled that the Petitioner failed to assert a claim in his 1983 action against a police officer for subjecting him to prosecution without probable cause, because the

petitioner incorrectly based the claim on substantive due process, rather than the Fourth Amendment.

During its discussion of substantive due process, the Supreme Court noted that "*Hurtado* held that the Due Process Clause did not make applicable to the States the Fifth Amendment's requirement that all prosecutions for an infamous crime be instituted by the indictment of a grand jury." *Albright*, 510 U.S. at 272 (1994) (citing *Hurtado v. California*, 110 U.S. 516, 527). This is, no doubt, where the CCA got its idea that the Fifth Amendment grand jury requirement did not apply to the states. However, the context of the *Hurtado* discussion in *Albright* shows that Supreme Court was actually distancing itself from the outdated *Hurtado* decision.

The Supreme Court was explaining that the Due Process Clause of the Fourteenth Amendment had incorporated many of the provisions of the Bill of Rights and applied them to the states, a process known as procedural due process, rather than extended those rights under the more elusive substantive due process:

> *Hurtado* held that the Due Process Clause did not make applicable to the States the Fifth Amendment's requirement that all prosecutions for an infamous crime be instituted by the indictment of a grand jury. In the more than 100 years which have elapsed since *Hurtado* was decided, the Court has concluded that a number of the procedural protections contained in the Bill of Rights were made applicable to the States by the Fourteenth

Amendment. See *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), overruling *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), and holding the Fourth Amendment's exclusionary rule applicable to the States; *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964), overruling *Twining v. New Jersey*, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908), and holding the Fifth Amendment's privilege against self-incrimination applicable to the States; *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), overruling *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), and holding the Double Jeopardy Clause of the Fifth Amendment applicable to the States; *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), overruling *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942), and holding that the Sixth Amendment's right to counsel was applicable to the States. See also *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967) (Sixth Amendment speedy trial right applicable to the States); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (Sixth Amendment right to compulsory process applicable to the States); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (Sixth Amendment right to jury trial applicable to the States).

Id. at 272-73. A careful review of the *Albright* case shows that the Court was actually calling into question the *Hurtado* decision.[12]

Further, it is important to note that the *majority of justices involved in the Albright plurality believed that some oversight was necessary before a criminal prosecution could commence.* For example, Justice Scalia's concurrence pointed out that substantive due process should not be relied upon where the Bill of Rights already addressed the issue at hand. *Id.* at 275-76 (Scalia, J., concurring). He further explained that "[t]he Bill of Rights sets forth, in the Fifth and Sixth Amendments, procedural guarantees relating to the period before and during trial, including a guarantee (the Grand Jury Clause) regarding the manner of indictment. Those requirements are not to be supplemented through the device of 'substantive due process.'" *Id.* at 276 (Scalia, J., concurring).

Further, as pointed out by Justice Stevens in his dissent, the plurality in *Albright* did not "take issue with the proposition that commencement of a criminal case deprives the accused of liberty, or that the state has a duty to make a probable-cause determination before filing charges." *Id.* at 300 (Stevens, J., dissenting). Indeed, Justice Stevens recognized that "[o]f greatest importance, in the aggregate those opinions do not reject my principal submission: the Due Process Clause of the Fourteenth Amendment constrains the power of

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[12] The *Hurtado* Court's reasoning was specifically rejected in *Powell v. Alabama*, 287 U.S. 45, 65-66 (1932).

state governments to accuse a citizen of an infamous crime." *Id.* at 316 (Stevens, J., dissenting). As Justice Stevens recognized, the Due Process Clause of the Fourteenth Amendment requires, at a minimum, that there be some probable cause determination before the initiation of a prosecution for an infamous crime. Thus, the Grand Jury Clause of the Fifth Amendment clearly applies to the states.

For this reason, the State of Texas violated Davila's constitutional rights by subjecting him to prosecution for a capital offense without first submitting all necessary elements to the grand jury for review.

IV. This Court should set aside Davila's conviction

The only remedy available for Davila is for this Court to set aside his conviction for capital murder and order the State of Texas either to release him, or to bring him to trial after properly submitting all necessary elements to a grand jury for review.

CLAIM TEN: The Trial Court Erred in Overruling Davila's Objection to the Constitutionality of Texas's So-Called "10-12 Rule"

Exhaustion: This Claim was raised as point of error thirteen in Davila's direct appeal to the Court of Criminal Appeals. It was addressed on its merits by that

court. *See Davila v. State*, AP-76,105, 2011 WL 303265 at 12 (Tex. Crim. App. 2011).

Davila argues that the Texas capital sentencing scheme, by affirmatively misleading jurors about their individual ability to give effect to their personal beliefs regarding mitigation, violates the Sixth, Eighth, and Fourteenth Amendments. This claim is based on *Mills v. Maryland*, where the Supreme Court ruled that the petitioner's sentence could not stand where it was possible that some "jurors were prevented from considering factors which may call for a less severe penalty [than death]." 486 U.S. 367, 376 (1988). As the Fifth Circuit has repeatedly recognized, "[s]ubsequent to *Mills*, the Supreme Court has explained that '*Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." *See, e.g.*, *Miller v. Johnson*, 200 F.3d 274, 288 (5th Cir. 2000) (citing *McKoy v. North Carolina*, 494 U.S. 433, 442-43 (1990)); *Jacobs v. Scott*, 31 F.3d 1319, 1328 (5th Cir. 1994).

The constitutional defect with Texas' current jury instructions is that they, by statute and as applied in Davila's case, mislead jurors about their individual ability to give effect to mitigating circumstances. *See* CR at 1936-38. Although Texas' sentencing statute gives individual jurors the power to prevent the death penalty if they believe mitigating circumstances call for a sentence of life, that same statute also misleads jurors into believing their individual beliefs are immaterial unless they are able to persuade nine of their

fellow jurors that their view of the evidence is correct. *See* Tex. Code of Crim. Proc. art. 37.071 § 2.

At the crux of this case, then, is the critical question: Could any member of the jury have interpreted the court's charge to mean that unless it either reached ten votes against the death penalty, or twelve votes in favor of the death penalty, that it would be deadlocked and force a mistrial? The answer is undoubtedly "yes." The jurors here were never informed, in plain and simple language, that if even one of them believed the death penalty should not be imposed, Davila could not be sentenced to death and that juror's holdout *would not* result in a hung jury. A reasonable juror would have believed that she had no ability – short of causing a hung jury – to determine that Davila deserved life in prison as a result of mitigating factors, unless nine other jurors agreed with her.

I. The "10-12 Rule" creates an impermissible risk of arbitrariness in violation of the Eighth and Fourteenth Amendments.

The requirement that a death sentence not be imposed arbitrarily is derived from the "Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). It was chiefly the concern that decisions of life and death were being made arbitrarily that led the Supreme Court in 1972 to

declare the death penalty to be in violation of the Eighth and Fourteenth Amendments to the Constitution. *See generally Furman v. Georgia*, 408 U.S. 238 (1972). In capital cases, therefore, the trial court is committed to ensuring that there is sufficient process to "guarantee, as much as is humanly possible, that the sentence was not imposed out of whim . . . or mistake." *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (overruled on other grounds).

The 10-12 Rule affirmatively creates confusion in the minds of the jurors. Jurors are first told that the jury as a whole "shall" answer "yes" or "no" to each issue presented. Art. 37.071 § 2(f)(1). They are subsequently told that ten or more jurors must be in agreement to give one set of answers and that they must be unanimous in order to give another. Art. 37.071 § 2(f)(2). This necessarily raises the question of what happens in the event that the jury, despite being instructed that it must answer each question, is unable to get the minimum number of votes required to give either answer.

The Code of Criminal Procedure clearly provides that in the event of a non-answer, the defendant is to receive a sentence that is identical to that which he or she would have received if the verdict had been in favor of life. Tex. Code Crim. Proc. art. 37.071§ 2(g). The law itself exhibits no facially apparent confusion with regard to the situation presented: "If the jury . . . *is unable to answer any issue submitted under Subsection (b) or (e)*, the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice

for life imprisonment without parole." *Id.* (emphasis added).

However, the statute actively prohibits any clarification of the confusion by preventing jurors from being informed at any point of the effect of a non-answer. *Id.* §§ 2(f)(1), 2(f)(2).

It is true that state legislatures are afforded discretion to decide what information is relevant to a capital sentencing determination, and are thus able to exclude some information from jury instructions. *See California v. Ramos*, 463 U.S. 992, 1001 (1983) (holding that the Court generally "defer[s] to the State's choice of substantive factors relevant to the penalty determination"). However, that discretion is bound by the requirements of due process. *See, e.g.*, *Simmons v. South Carolina*, 512 U.S. 154, 175 (1994) (O'Connor, J., concurring); *Ramdass v. Angelone*, 530 U.S. 156, 195 (2000) (Stevens, J., dissenting); *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001); *Kelly v. South Carolina*, 534 U.S. 246, 248 (2002).

In *Ramos*, the Court permitted a jury instruction regarding the state governor's commutation powers on the ground that the instruction was both accurate and relevant to a legitimate state penological interest. *Ramos*, 463 U.S. at 1001-06. Despite being prompted to apply *Ramos* in *Caldwell*, the Court refused, holding that when the state argues that automatic appellate review is meant to determine whether the death penalty is appropriate in a given case, this information not only inaccurately depicts the role of the appellate

court, but more importantly, it serves an illegitimate state purpose by diminishing the ability of jurors to feel the gravity of their task. *Caldwell*, 472 U.S. at 336-41.

The Texas procedural rules and corresponding jury instructions are equally inaccurate and illegitimate. When the jury is instructed that it may not "assess" [or reach] a verdict of life unless ten or more jurors agree upon an answer supporting a life sentence in response to at least one of the two issues, it provides the decision maker an incorrect statement of the very law it is required to follow. The *truth*, which is actively kept from the decision maker, is that if only one juror concludes that sufficient mitigation exists to warrant the imposition of a life sentence, despite that juror's inability to convince nine other jurors of his or her position, a life sentence will be imposed. This situation is unique to capital sentencing juries. During the guilt/innocence phase of a criminal trial, the jury is explicitly told that unanimity is required for either a verdict of guilt or acquittal. Although anything short of unanimity will lead to a mistrial, and thus might lead the defendant to be released as though he were acquitted, he may still be retried and is thus unable to claim numerous basic constitutional protections such as that of double jeopardy.

Under the Texas capital sentencing scheme, while the legislature might prefer a life sentence that results from the agreement of ten jurors to a default sentence resulting from a single holdout juror, the position of the defendant is identical in both. *See Padgett v. State*, 717

S.W.2d 55, 58 (Tex. Cr. App. 1986) (holding that "a jury's inability to answer a punishment question in a capital murder case, has the same sentencing effect as a negative answer"). Thus, instructing the jury that ten or more of them must agree upon a "life" answer in order to sentence the defendant to life, regardless of whether the court informs the jury of the effects of a non-answer, is a *patently* incorrect statement of the law. So long as the Texas statute equates the sentencing consequences of a life verdict with the consequences of a non-verdict, the jury must not be misled to believe that anything more than one vote for life is required to secure that sentence. The falsity of the instructions, by the very falsity, functions to impose on life-leaning jurors a burden to persuade other jurors when no such burden exists under the law.

This was not the case prior to 1981. Under Texas' former capital sentencing statute, if a jury failed to respond to either of the special issues, the result was a complete mistrial – requiring a new trial, not just on sentencing, but on guilt as well. *See Eads v. State*, 598 S.W.2d 304, 308 (Tex. Cr. App. 1980). Under such a scheme, setting aside the other arguments proffered here, an instruction that ten or more jurors are required for a life sentence would be just as unobjectionable as an instruction that unanimity is required for death, a finding of guilty, or an acquittal. Presumably in response to *Eads* and the additional costs and difficulties that such a situation would pose, in 1981 the Texas Legislature amended the death penalty statute, inserting the default sentence of life in the event of a

non-answer. At this time the Legislature also added the infirm language that is now in Article 37.071 § 2(a), prohibiting jurors from being informed of this default result. It is clear that the Legislature wished to change the sentencing reality of defendants without informing jurors of this change. In doing so, however, the legislative change made the old instructions inaccurate depictions of the law.

Not only are the instructions inaccurate, but they were intended to be inaccurate and confusing in order to serve an illegitimate state interest. Just as jurors who are informed that their decision will be reviewed for appropriateness by an appellate court are impermissibly led to deflect their profound responsibility onto the appellate courts, Texas jurors are impermissibly led to relieve themselves of a sense of responsibility by placing it either upon the other jurors who are unwilling to join the vote in favor of life or upon the statutory scheme that purports to require ten votes, rather than merely one, in order to give a life sentence. The principle behind *Caldwell* is that courts must ensure that jurors are not invited to place their individual responsibility onto anyone else. *Caldwell*, 472 U.S. at 329. Just as it is impermissible to lead jurors to place that responsibility upon the appellate courts, it is impermissible to lead them to place it upon their fellow jurors, or upon a restrictive sentencing statute.

The result of misinforming jurors and forcing them to deliberate without knowledge of what happens in the event of a non-answer is that they are presented

with a false dilemma. Jurors are given general instructions that they must answer either "yes" or "no" to the issues before them and specific instructions that define the minimum number of votes required to give each of these answers. Because they are told that a death sentence follows from one set of answers and a life sentence follows from another, a reasonable juror might conclude that the only way to get either of these punishments is to answer the questions posed to them. *See California v. Brown*, 479 U.S. 538, 541 (1987) (quoting *Francis v. Franklin*, 471 U.S. 307, 315-316 (1985) (holding that the constitutional sufficiency of capital sentencing instructions is determined by "what a reasonable juror could have understood the charge as meaning")). This leaves jurors free to speculate as to what would occur should they be unable to provide an answer to the issues. While it is possible that jurors might correctly guess that the failure to agree will result in a life sentence, it is perhaps more likely that they will conclude that a non-answer will lead to a lesser sentence, a costly retrial or resentencing proceeding, or absolute freedom for the defendant. Given that each of the jurors has already found the defendant guilty of a capital offense, none of these options would look desirable to a juror who honestly believes that a life sentence is warranted.

In *Simmons v. South Carolina*, the Court prohibited just this sort of unfairness, holding that "[t]he State may not create a false dilemma by advancing generalized arguments regarding the defendant's

future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Simmons*, 512 U.S. at 171. The Texas statute instructs jurors that at least ten of them must agree in order for a life sentence to be imposed, yet it prohibits jurors from learning that only one vote is actually required for a life sentence. It is precisely because jurors are left to speculate when capital juries are not informed of the consequences of a deadlock that several states have declared the practice violate [sic] the Eighth Amendment. *See, e.g.*, *Louisiana v. Williams*, 392 So.2d 619, 634-35 (1980) (holding that "by allowing the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court failed to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action"); *State v. Ramseur*, 106 N.J. 123, 314 (1987) ("[T]he jury must be told, in effect, that the law recognizes deadlock as a permissible result, an outcome allowed by the statute, a legal trial verdict that by law results in imprisonment rather than death.").

While this confusion might pressure jurors to change their position in order to avoid the unknown third option, it might lead to an even more basic misunderstanding. Because jurors are told that each question must be answered, and ballots do not include an option for non-answer, a reasonable juror following the instructions might believe that a non-answer is not only undesirable, but is in fact impermissible. Such a juror might believe that because he or she is unable to

secure the ten votes required to give the answer that that juror wishes the jury to give, and because some answer either way must be given, that juror is in fact obliged to vote with the others and sentence the defendant to death. Although the law is clear that a death sentence must never be mandatory, and individual jurors must always be free to vote for life, the opposite conclusion reasonably follows from the instructions mandated by the Texas sentencing scheme. In fact, jurors often mistakenly believe that they are required by law to impose death."[13] One study found that when jurors asked for clarification and were simply referred back to the original instructions, rather than being disavowed of their false belief, they became more likely to mistakenly believe that the evidence required them to vote for death.[14] This is precisely what the Texas statute requires when jurors ask questions regarding the implications of a non-answer. Art. 37.071 § 2(a)(1). The Texas statute provides instructions that lead jurors to

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[13] *See generally* Garvey, Stephen P., Sheri Lynn Johnson, and Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 Cornell L. Rev. 627 (2000). Another study identified other significant misconceptions among capital jurors regarding the sentencing process: "About half the jurors incorrectly believe that a mitigating factor must be proved beyond a reasonable doubt. Less than a third of jurors understand that mitigating factors need only be proved to the juror's personal satisfaction. The great majority of jurors – in excess of sixty percent in both life and death cases – erroneously believe that jurors must agree unanimously for a mitigating circumstance to support a vote against death." Eisenberg, Theodore, and Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993).

[14] Garvey, 85 Cornell L. Rev. at 639.

false beliefs regarding their sentencing options, and prohibit them from learning the true options, which functions to all but secure a sentence of death.

II. The "10-12 Rule" denied Davila his Eighth Amendment right to individualized sentencing.

The Constitution requires that Texas balance its obligation to minimize the risk of arbitrariness with the need for individualized sentencing. "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting death." *Woodson*, 428 U.S. at 304. To advance this demand, the Court subsequently held that "[t]he sentencer . . . [cannot] be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (citation omitted). Later cases have clarified that such mitigating evidence need only be proven by a preponderance of the evidence. *See Walton v. Arizona*, 497 U.S. 639, 649-50 (1990) (overruled on other grounds). More importantly, the Court has unequivocally held, and the Texas statute clearly states, that a single juror must be permitted to consider and weigh mitigating evidence unilaterally, regardless of whether any other jurors accept the evidence as mitigation:

"[T]he jury . . . need not agree on what particular evidence supports an affirmative finding on the issue." Art. 37.071 § 2(f)(3). *See McKoy v. North Carolina*, 494 U.S. 433, 435 (1990); *Mills v. Maryland*, 486 U.S. 367, 374-75 (1988).

Although the capital sentencing jury resembles juries that sit in the guilt/innocence phase of capital and non-capital trials, its role is distinct. All juries have historically been expected "to secure unanimity by comparison of views, and by arguments among the jurors themselves." *Jones*, 527 U.S. at 382 (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)). The capital sentencing jury, however, is charged more precisely with the duty to "express the conscience of the community on the ultimate question of life or death." *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988). Because extraordinary protections are constitutionally required to ensure against unwarranted impositions of death, the Texas sentencing scheme, like the Louisiana statute, creates "a situation unique to the capital trial that a single juror, by persisting in a sentencing recommendation at variance with all of his fellow jurors, may alone cause imposition of a life sentence." *State v. Loyd*, 459 So.2d 498, 503 (La. 1984). The requirement of individualized sentencing in capital trials means not simply that defendants must be judged based upon their own character, but that they must be judged as such by individual jurors charged with considering the evidence and asked to make determinations of life and death. This clearly follows from the Court's demands that each individual juror be permitted to consider

mitigating evidence which that juror alone finds to exist simply by a preponderance of the evidence.

Members of a capital sentencing jury sit through the court's instructions, take an oath, and pass through the extraordinary process of death qualification. Because of this care, death penalty jurors, more than the members of any other jury, are unbiased, impartial, and capable of deliberation. It cannot be correct, therefore, to say that informing jurors of the effects of a deadlock would act as an "open invitation for the jury to avoid its responsibility and to disagree." *Davis v. State*, 782 S.W.2d 211, 221 (Tex Crim. App. 1989) (en Banc).

Giving the jury the truth would only serve to solemnize and make clear the responsibility each individual juror bears. As it stands, if a juror decides that sufficient mitigation exists to warrant a life sentence, and wishes to stick to that position despite the fact that it will prevent the jury from reaching a verdict, he acts under the impression that he would violate some abstract duty to "secure unanimity" or to not "disagree." Under the Texas sentencing statute, a juror would be abdicating his or her responsibility were he or she to not answer one of the questions. "The issues are framed in a manner which permits them to be answered either affirmatively or negatively, and it is the purpose of the deliberative process to resolve juror vacillation." *Nobles v. State*, 843 S.W.2d 503, 510 (Tex. Cr. App. 1992); Art. 37.071 § 2(f). Once deliberation has taken place and each juror has settled upon an answer to the two special issues, however, the failure of those

votes to meet the numerical requirements of the "12-10 [sic] Rule" cannot be considered a violation of the jury's duty. On the contrary, as the Supreme Court of New Jersey determined regarding New Jersey's statutory scheme, and is equally true under the Texas statutory scheme, a "capital jury does not 'avoid its responsibility' by disagreeing – genuine disagreement is a statutorily permissible conclusion of its deliberations." *State v. Ramseur*, 106 N.J. 123, 311 (N.J. 1987).

Indeed, *McKoy* and *Mills* together stand for the principle that the Constitution prohibits erecting barriers to prevent the jury from disagreeing. This is precisely what the "12-10 [sic] Rule" is – a barrier to prevent disagreement, the substantive effect of which is a statutory prohibition keeping individual jurors from having a "meaningful opportunity" to judge the defendant on the basis of mitigation. The rule creates the absolutely false appearance that while each juror may weigh mitigating evidence unilaterally, a minimum of ten jurors are required to pass judgment on such factors. This was precisely what the Court was concerned about in *McKoy* when it held "*Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." *McKoy*, 494 U.S. at 442-43. It is not enough for Texas to inform the jury that they "need not agree on what particular evidence supports an affirmative finding on the issue [of mitigation]," if the effect of the entire instruction is that ten or more jurors must agree upon an affirmative finding in order to give effect to the finding of any one

juror. Tex. Code Crim. Proc. art. 37.071 § 2(f)(3). Each juror must be capable of giving effect to mitigating evidence when determining the appropriate punishment, and thus only one juror, not ten, must be sufficient under Article 37.071 § 2(f)(2) to answer "yes" to the mitigation issue presented by Article 37.071 § 2(e)(1). By instructing the jury that ten jurors are required in order to give a "yes" answer, the Texas statute violates the principles underlying *Mills* and *McKoy* by preventing individual jurors from having a meaningful opportunity to consider mitigating factors.

III. The "10-12 Rule" denied Davila his Sixth Amendment right to a fair and impartial jury.

As discussed above, the 10-12 Rule necessarily functions to create confusion in the minds of the jurors, and then prohibits them from having their confusion clarified. This was earlier discussed within the context of the additional Eighth Amendment safeguards required to reduce the risk of arbitrary and unreliable sentences. It is beyond dispute that capital juries are often dominated by misconceptions regarding the state of the law, the role of individual jurors, and the definition of key concepts such as mitigation. As discussed above, a reasonable juror who conscientiously attempts to understand the Texas sentencing statute might be led to believe that just as a sentence of death may not be imposed unless the jury is unanimous with regard to both special issues, a sentence of life may not be imposed unless at least ten jurors agree with

respect to at least one of the two special issues. Not only does this mistaken belief raise an Eighth Amendment problem with regard to arbitrariness and reliability, but the possibility that jurors might draw upon their preconceived notions to resolve such a situation raises Sixth Amendment concerns.

The right to an impartial jury has long been recognized as fundamental. *See, e.g.*, *Lockhart v. McCree*, 476 U.S. 162 (1986). This is particularly crucial in capital cases, where the Constitution demands that "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968).

To protect this right, courts are obliged to take reasonable steps to ensure the impartiality of a jury. It is for this reason that voir dire is made available to both parties, the judge is equipped with the power to strike jurors for cause, each party is granted a certain number of peremptory challenges, and jury instructions are fashioned to clarify the jury's role and impress upon them the importance of their task and the oath to which they have sworn.

By manufacturing confusion in the minds of the jury and preventing the court or the attorneys from correcting it, the 10-12 Rule creates fertile ground for jurors to draw upon their own biases and preconceived notions in coming to a verdict. This is particularly dangerous when jurors are confused about their sentencing options and the results of their sentencing

decisions. The concept of a hung jury is widely understood to be a disfavored result. In most trials, a hung jury leads to a mistrial, and most people understand that a mistrial will either lead to a costly retrial or to the dropping of charges. While neither of these undesirable outcomes would actually result from a hung jury in capital sentencing under the Texas statute, jurors are required to be kept in the dark with regard to that materially relevant fact. The 10-12 Rule forces the jury to wonder what would happen were they are unable to answer the special issues, possibly leads them to believe that an unacceptable third alternative other than life and death would follow, and then leaves them to draw upon their own preconceived notions in coming to a verdict. While the concept of a mistrial might be distasteful to a holdout and disfavored by the court during the guilt/innocence phase of a non-capital criminal trial, it is surely unacceptable to a juror in a capital sentencing proceeding who has already found the defendant guilty of capital murder. The risk that jurors will enter the courtroom with that misconception is too great to allow them to continue deliberating in the dark.

To ensure that capital juries do not rely upon their biases regarding hung juries during deliberations, jurors must either have their misperceptions corrected, or they must be examined for bias during voir dire. Because of the additional Eighth Amendment problems with forcing jurors to deliberate using false information, this Court should declare Article 37.071 § 2(a)

unconstitutional with respect to its prohibition on informing the jury of the effect of a deadlock.

IV. Ms. Sabrina Gundy was the holdout juror in Davila's trial.

The possibility that a single life-leaning juror would change her vote to death based on misleading instructions is especially relevant to Davila's case. In Davila's case, the jury retired to deliberate on punishment at 11:31 a.m. on February 26, 2009. 25 RR 79. They continued deliberating until 5:35 p.m. *Id.* at 80. It was not until 11:12 a.m. the next morning that the jury was able to reach a verdict. In her affidavit, filed by the State of Texas during the state writ proceedings, defense attorney Joetta Keene recalled watching juror Sabrina Gundy crying, alone, in a park before the jury came back with a verdict. Writ CR at 277. Ms. Keene explained, "I watch [sic] the older African-American woman sit alone. I watched her cry on that park bench. In that moment, I knew we were losing our last holdout." It is entirely possible that had Sabrina Gundy not been affirmatively misled about her individual power to prevent a death sentence, she would have exercised her individual power, a possibility that would mean the difference between life and death for Erick Davila.

Thus, in this case, like many others before it, the inadequate and misleading jury charged [sic] violated Appellant's Sixth, Eighth, and Fourteenth Amendment rights.

CLAIM ELEVEN: The Trial Court Erred in Overruling Davila's Motion to Instruct the Jury That the Sentencing Burden of Proof on the Mitigation Issue Lies With the State

Exhaustion: This Claim was raised as point of error fourteen in Davila's direct appeal to the Court of Criminal Appeals. It was addressed on its merits by that court. *See Davila v. State*, AP-76,105, 2011 WL 303265 at 12 (Tex. Crim. App. 2011).

The Fifth Amendment to the U.S. Constitution guarantees that no person may be deprived of liberty without due process of law, while the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amends. V, VI. The right to trial by jury in serious criminal cases is "fundamental to the American scheme of justice, and therefore applicable in state proceedings." *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)). A prosecution must prove all elements of the offense charged and must persuade the fact finder beyond a reasonable doubt of the facts necessary to establish each of those elements. *Id.* at 277-78. The Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. *Id.*

The trial court effectively deprived Davila of his right to a jury trial and his right to have all of the elements of the offense proven beyond a reasonable doubt,

as guaranteed under the Fifth and Sixth Amendments. Although the Court of Criminal Appeals (and, by extension, the United States District Courts of Texas) has previously declined to rule in favor of claims similar to Davila's, the conclusion properly drawn from the Supreme Court's decisions in *Apprendi v. New Jersey*, *Ring v. Arizona*, and *Cunningham v. California*, when considered in alongside the Texas death penalty statutory scheme, is inescapable: Because the mitigation issue in the Code of Criminal Procedure Art. 37.071 § 2 (Special Issue Number Two) increases the maximum penalty for the crime of capital murder, Texas' statutory scheme is unconstitutional for not requiring this issue to be submitted, proved, and found by the jury beyond a reasonable doubt.

I. Clear Supreme Court precedent demonstrates the myriad ways that the statutorily-mandated characterization of the Mitigation Special Issue is unconstitutional.

A. *Apprendi v. New Jersey*

In *Apprendi*, the defendant was convicted of a firearms offense under New Jersey state law. 530 U.S. 466 (2000). After Apprendi pleaded guilty, the prosecutor filed a motion, granted by the judge, to enhance his sentence under an independent "hate crime" statute that authorized imposition of a longer sentence if the trial court found by a preponderance of the evidence that the crime was motivated by racial bias. *Id.* at 469-71. The Supreme Court noted that *Apprendi*'s case squarely presented the issue of whether he had the

right to have a jury, rather than the trial court, decide whether his crime was motivated by bias. In *Apprendi*, the Court held:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Id. at 475-76. The Court reiterated that a criminal defendant's rights to due process, and the associated jury protections, extend not only to a defendant's trial on guilt or innocence, but also to determinations that affect the length of the defendant's sentence. *Id.* at 484 (citing *Almandarez-Torres v. United States*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)).

B. *Ring v. Arizona*

In *Ring*, the Court relied on its decisions in *Apprendi* and *Jones v. United States*, 526 U.S. 227 (1999) to review the constitutionality of a death sentence imposed under the Arizona state statutory sentencing scheme. *Ring v. Arizona*, 536 U.S. 584, 603 (2002). The Court concluded that, because Arizona state law authorized the death penalty only if an aggravating factor was present, *Apprendi* required the existence of such a factor to be proven beyond a reasonable doubt to a jury rather than to the trial court. *Id.* The Court

also specifically overruled its earlier decision in *Walton v. Arizona*, 497 U.S. 639 (1990), which had upheld an Arizona death sentence against a similar challenge. *Id.* at 589. Citing the irreconcilability of *Walton*'s result with its reasoning in *Apprendi*, the *Ring* Court came to the following intuitive conclusion: "Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.*

When *Ring* was decided, Arizona's first degree murder statute provided that the offense was punishable by either death or life imprisonment. *Id.* at 592. The statute required the judge to hold a separate hearing and find all facts and circumstances to determine the appropriate sentence. *Id.* At the conclusion of the hearing, the judge was to determine the presence or absence of those aggravating or mitigating circumstances. *Id.* As the court in *Ring* pointed out, "[b]ased solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment." *Id.* at 597. The Court concluded that if the state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt. *Id.* at 602.

Thus, "[a] defendant may not be expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* Integral to the Court's holding was

its review of Justice O'Connor's dissent in *Apprendi*, where she disagreed with the majority's interpretation of the Arizona death penalty statute, noting: "A defendant convicted of first degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." *Apprendi*, 530 U.S. at 538 (O'Connor, J., dissenting).

C. *Cunningham v. California*

More recently, the Supreme Court has reaffirmed that the Constitution requires that all facts relative to guilt or impacting punishment be found by a jury beyond a reasonable doubt. *Cunningham v. California*, 549 U.S. 270 (2007). In *Cunningham*, the Court considered and rejected a California statutory scheme that required the judge, rather than the jury, to find certain "circumstances in aggravation" relative to punishment in order to justify the imposition of the upper prison term. *Id.* at 275. The relevant California rule required only that circumstances in aggravation "shall be established by a preponderance of the evidence." *Id.* at 279. In determining that the rule in question was constitutionally infirm, the Court explained:

> "Because circumstances in aggravation are found by the judge and not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt . . . the [rule] violates *Apprendi*'s bright-line rule:

> Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and be proved beyond a reasonable doubt.'"

Cunningham, 549 U.S. at 286 (quoting *Apprendi*, 530 U.S. at 490).

II. The Texas Death Penalty Statutory Scheme

Texas Penal Code § 19.03 defines the offense of capital murder, while § 12.31 sets out the punishment for capital felonies. Tex. Penal Code §§ 19.03, 12.31. Under § 12.31, an individual found guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by life imprisonment without parole, or by death. The Penal Code does not provide instruction as to which defendants found guilty of capital murder are eligible for death. For this, state law requires that the jury make additional findings pursuant to the Texas Code of Criminal Procedure Art. 37.071 § 2. Thus, like Arizona's statutory scheme discussed in *Ring*, the Texas death penalty statute requires cross-referencing and additional fact finding under another statutory provision before a defendant can be sentenced. *Ring*, 536 U.S. at 586. A defendant convicted of capital murder in Texas may not be sentenced to death until the jury makes additional findings of fact under Article 37.071 §§ 2(b) and 2(e).

In Texas, if a defendant is found guilty of a capital offense for which the state is seeking the death penalty,

the court must conduct a separate sentencing proceeding, before the jury, to determine whether the defendant should be sentenced to death or life imprisonment without parole. Art. 37.071 § 2(a)(1). At this proceeding, either side may present evidence on any matter that the court deems relevant to sentencing, including evidence of the defendant's background or character, or circumstances of the offense that support the imposition of the death penalty or mitigate against it. *Id.* At the conclusion of the evidence, Article 37.071 requires that the court submit special issues to the jury, including "the probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* § 2(b)(1). If the jury returns an [sic] unanimous, affirmative finding on that issue, it must then decide:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance, or circumstances, to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

Id. § 2(e)(1).

If the jury returns a negative finding on any issue submitted under § 2(b), or cannot reach a unanimous affirmative finding, the court must sentence the defendant to life imprisonment without parole. *Id.* § 2(g). Likewise, if the jury reaches an affirmative finding on

the issue under § 2(e)(1), or is unable to reach a unanimous negative result, the defendant must receive a life sentence without parole. *Id.* § 2(g). In other words, Texas law authorizes the trial court to sentence the defendant to death only if: (1) the jury unanimously finds there is evidence to prove, beyond a reasonable doubt, that the defendant will probably commit future acts of violence that pose a continuing threat to society; and (2) the jury unanimously agrees that the evidence in mitigation of the offense is not sufficient to warrant a sentence of life imprisonment rather than death. Thus, Davila could not be punished with a greater sentence – in this case, the death penalty – until and unless the jury *unanimously* found that (1) there was a probability that Davila would commit criminal acts of violence that would constitute a continuing threat to society, and (2) any mitigating evidence did not rise to a level to warrant a sentence of life imprisonment rather than a death sentence.

As the Supreme Court in *Ring* stated: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Ring*, 536 U.S. at 609. Likewise, Davila's right to a jury trial will be undermined if this Court holds that his Sixth Amendment right encompasses the right to have the jury find beyond a reasonable doubt that he was responsible for the deaths of the decedents, but not to find all the facts beyond a

reasonable doubt necessary before he is eligible for the death penalty to be imposed under Article 37.071.

Despite the obvious constitutional issues raised in requiring a defendant to prove that he is not "death-worthy," the Court of Criminal Appeals has continued to hold that "the burden is implicitly placed upon [the defendant] to produce and persuade the jury that circumstances exist which mitigate against the imposition of death in his case." *Lawton v. State*, 913 S.W.2d 542, 557 (Tex. Crim. App. 1995). *See also Allen v. State*, 108 S.W.3d 281, 285 (Tex Crim. App. 2003) (declining to consider sufficiency of the evidence to support the special issues). In *Lawton*, the Court of Criminal Appeals insisted that "there is no constitutional requirement that the burden of proof regarding mitigating evidence be placed on either party, and to the extent that the burden is on appellant . . . it is not unconstitutional to so place the burden." *Id.* at 557.

Likewise, in *Cantu v. State*, 939 S.W.2d 627 (Tex. Crim. App. 1997), the Court of Criminal Appeals held that failing to assign a burden of proof on the mitigation issue, or placing the burden on the defendant rather than the State, does not render the Texas statutory scheme unconstitutional. *Id.* at 641. "In instances where mitigating evidence is presented, all that is constitutionally required is a vehicle by which the jury can consider and give effect to the mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime. . . . [T]he absence of an explicit assignment of the burden of proof does not render Article 37.071 § 2(e) unconstitutional."

Id. Both *Cantu* and *Lawton* were squarely based on the Supreme Court's opinion in *Walton v. Arizona*. *Walton*, however, was expressly overruled by *Ring*. *Ring*, 536 U.S. at 609 ("[W]e hold that *Walton* and *Apprendi* are irreconcilable.").

The Fifth Circuit Court has likewise declined to shift the burden of proof from the defendant to the state on the issue of mitigation. In *Rowell v. Dretke*, the court addressed this issue in the context of whether the respondent had established that he was entitled to a certificate of appealability under 28 U.S.C. § 2253(c)(2). 398 F.3d 370 (5th Cir. 2005). The court held that *Ring* did not apply to Rowell's case because the Supreme Court did not contemplate that the Sixth Amendment's "reasonable doubt" requirement would extend to a capital sentencing jury's findings regarding mitigating factors. Instead, *Ring* focused exclusively on certain judicial findings regarding aggravating factors. *Rowell*, 398 F.3d at 877-78. The state argued, and the court agreed, that Rowell was foreclosed from relying on *Ring* and *Apprendi*, because unlike the statutory schemes challenged in those cases, the Texas mitigation special issue does not operate as "the functional equivalent of an element of a greater offense." *Id.* at 377.

In *Rowell*, the court correctly noted that the jury is the "entity that determines death eligibility beyond a reasonable doubt." However, the court upheld the Texas death penalty scheme as constitutional by reasoning that "mitigating evidence" under the Texas statutory scheme is a "fact in mitigation," which no

controlling authority required the state to prove beyond a reasonable doubt, rather than a "fact in aggravation of punishment." *Id.* at 376-78. The court in *Rowell* stated: "[N]o burden of proof exists for either the defendant or the State to prove or disprove mitigating evidence at the punishment phase. This is because the Supreme Court recognizes an important distinction between 'facts in aggravation of punishment and facts in mitigation.' Moreover, no Supreme Court or Fifth Circuit authority requires the State to prove the absence of mitigating circumstances beyond a reasonable doubt." *Id.* at 378 (citing *Apprendi*, 530 U.S. at 490 n. 16).

As illustrated by the *Rowell* case, in rejecting the applicability of *Apprendi* to the Texas death penalty statute, courts have relied heavily on language from *Apprendi* stating that "the Court has often recognized [the distinction] between facts in aggravation of punishment and facts in mitigation." *Apprendi*, 530 U.S. at 490 n. 16. However, read in context, *Apprendi* and *Cunningham* make clear that if a fact must be found by the jury *before* the defendant may be put to death, then that fact is an "element of the offense" that must be proved to the jury beyond a reasonable doubt. *Id.* at 490; *Cunningham*, 549 U.S. at 286. The Court in *Apprendi* was explicit on this point: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490.

Under *Apprendi, Ring*, and *Cunningham*, Special Issue Number Two is unconstitutional because it fails to place the burden on the state of proving a negative answer to the mitigation issue beyond a reasonable doubt. *See, e.g., United States v. Matthews*, 312 F.3d 652, 663 (5th Cir. 2002). In *Matthews*, the court held, consistent with *Apprendi*, held that any fact that increases the statutory maximum penalty must be found by a jury beyond a reasonable doubt, regardless of whether the legislature intended the fact to be a "sentencing factor" or an "element" of a separate offense. *Id.* The Texas statute cannot be saved simply because the required fact finding is labeled "mitigation." The Supreme Court has clarified that *Apprendi* repeatedly instructs that the characterization of a fact or circumstance as an "element" or a "sentencing factor" is not determinative. *Ring*, 536 U.S. at 602; *see also Matthews*, 312 F.3d at 662-63. The dispositive question, then, is not one of form but of effect. *Ring*, 536 U.S. at 602. If a state makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the state labels it – must be found by a jury beyond a reasonable doubt. *Id.* Article 37.071 provides that a defendant convicted of capital murder is not eligible for the death penalty until and unless the jury finds that there is not mitigating evidence that would justify a life sentence rather than death. Thus, whether the State of Texas calls Special Issue Number Two "facts in mitigation," rather than "facts in aggravation" or "sentencing factors," does not change the *effect* of the dispositive issue: the defendant in a capital murder case cannot be put to death (that

is, his level of punishment cannot be raised beyond life imprisonment) unless the jury makes findings of fact under Special Issue Number Two. Under clear Supreme Court precedent (*Ring*, *Apprendi*, and *Cunningham*), the mitigation issue is an element of the offense that the state must prove beyond a reasonable doubt before a defendant can be sentenced to death.

If the Texas statutory scheme provided that punishment for capital murder was automatically death, *unless facts in mitigation were shown*, then *Ring* would foreclose Davila's argument on this issue. However, "[a]ggravators operate as statutory 'elements' of capital murder under [Texas] law because in their absence, [the death] sentence is unavailable." *Ring*, 536 U.S. at 599 (citing *Walton v. Arizona*, 497 U.S. at 709 n. 1 (Stevens, J., dissenting)). Davila could not have been assessed the death penalty unless there was a negative finding on Special Issue Number Two. As a result, the statute has made the "absence" of mitigating circumstances an element that must be proven beyond a reasonable doubt.

The Texas death penalty scheme is unconstitutional because it impermissibly shifts the burden of proof on mitigation to the defendant. The statute requires the jury to consider, along with mitigating evidence, the "moral culpability of the defendant," having just found the defendant guilty of the offense, beyond a reasonable doubt. The statute then demands that the defense produce "sufficient" mitigation (while considering this same "moral culpability") to warrant a sentence of life imprisonment. The mitigating evidence

must be "sufficient" to reduce the defendant's moral culpability or blameworthiness as already established in the jurors' minds. In death penalty deliberations, "moral culpability" is not evidence – it is a finding that the jury has already made. The statute places an unfair, undue, and unconstitutional emphasis on that finding. The defendant, if he is to save his own life, must offer evidence that is somehow greater than the finding of moral culpability beyond a reasonable doubt.

Aside from shifting the burden of proof to the defendant, the statute provides no other guidance to the jury that is called upon to make this life and death decision. As a result, the death penalty is imposed in a wanton, haphazard manner in violation of the defendant's rights to due process and protection from cruel and unusual punishment.

This impermissible shift of the burden to the defense is made more unconscionable by the language of Article 37.071 § 2(f), which provides that the jury shall not answer the mitigation issue "yes" (resulting in a life sentence) unless ten or more jurors agree. The defense, according to the instructions to the jury, must then offer "sufficient" mitigating evidence to not only overcome his "moral culpability" as already established in the eyes of the jury, but ten of those jurors must be convinced of the sufficiency of that evidence.

Moreover, the effect of the statutory scheme is to require the defendant not merely to assume a burden of proving mitigation, but to demonstrate mitigation

sufficient to outweigh the jury's pre-existing affirmative finding, beyond a reasonable doubt, of the aggravating factor of future dangerousness. Davila is aware of the existence of adverse authority in this matter, but nonetheless contends that these issues merit the Court's serious reconsideration.

By not requiring the "beyond a reasonable doubt standard" to prove that element, the statutory scheme violates *Apprendi, Ring, Cunningham*, and the Sixth and Fourteenth Amendments to the United States Constitution. Therefore, this Court should reverse Davila's death sentence, and remand his case for a new hearing on punishment.

CLAIM TWELVE: Davila's Trial Was Contaminated By Improper Influence That Affected the Deliberations Process

Petitioner Davila raised this claim as a potential claim in his initial writ, but has chosen not to pursue this claim any further.

CLAIM THIRTEEN: Davila's conviction and sentence were obtained in violation of *Brady*

This claim was identified by Davila as a potential claim in his initial writ. However, after a more thorough review of the evidence in this case, including: a review of the Tarrant County District Attorney's Office file related to Davila's case, Davila's trial counsel's files (at least those of Ms. Keene; Mr. Fords file has never

been found after his passing), and the trial record, **Davila abandons this claim**. However, undersigned counsel feels the need to briefly identify the reason the claim was initially alleged, and the reason it is now being abandoned.

In *Brady v. Maryland*, the Supreme Court held that suppression by the State of "evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). During undersigned counsels' investigation an email between two members of the Fort Worth Police Department was found, which in relevant part explained "Sgt. Kevin Foster was at Cooks Children's Hospital on the night of the shooting . . . Sgt. Foster began talking to the father of the child that died later that night. The father related to Sgt. Foster that he believed the shooting was committed by gang members . . . The father indicated to Foster that he had been affiliated with the Polywood Crips." *See* Exhibit "C" (Filed under seal).

Initially undersigned counsel believed that this evidence had never been turned over to the defense, primarily because Jerry Stevenson's repeated denial of gang affiliation (15 RR 71-73, 92) was never specifically rebutted. However, a closer review of the record shows that while the defense might not have uncovered the specific email in question, it appears they did have information showing that Stevenson was indeed a rival gang member of Davila. For example, toward the beginning of the testimony in this case Officer

Jimmy Hewett testified that he had no knowledge that any Polywood Crips lived at the residence where the shooting occurred. 14 RR at 189-90. Immediately after Officer Hewett's answer defense Counsel Ford asked to approach, apparently to show Officer Hewett an inter-office memo he had prepared in this case. *Id.* Officer Hewett then remembered that he had indeed spoken to another officer who had informed him that the residents of the apartment were Crips, and that this information needed to be passed on. *Id.* at 196. Officer Hewett confirmed Crips living in the complex would be odd because the shooting took place in Blood Territory. *Id.*

Further, detective Johnson, lead detective in the case, answered in the affirmative on cross examination that he "had information that the residents of 5701 were Crips, and that the shooter was a possible Village Creek Blood." This information, coupled with Stevenson's affirmance that he was the only adult male present at the residence, 15 RR at 44, leads to the logical conclusion that, despite his denials, Stevenson was associated with the Crip Gang. In short, although the defense never established that it was Stevenson himself who admitted to police his involvement with the Crips, it appears the defense team did know of his involvement and of his statements to police.

Further, and more importantly, even had the [sic] Stevenson's statements not been disclosed by the State of Texas, Davila would not have been able to prove the withheld information was material. Evidence withheld by the state is material, and a new trial is required, if

there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different. *See e.g. Giglio v. US.*, 405 U.S. 150, 154 ("A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury."). Davila would not have been able to show materiality because the jury in his case clearly believed that he only intended to take the life of a single person, Jerry Stevenson. CR at 1931.

We know the jury believed Stevenson was the only intended target because of the note they sent the judge immediately before reaching their verdict. The note asked if capital murder required the specific intent to murder the specific victims, or if the only intent required was that "to murder a person and in the process took the lives of 2 others." CR at 1931. As explained in Claim Three, the jury would not have needed clarification if they believed Davila intended to harm the two victims of his shooting; the question was only relevant if they believed he solely intended to kill Jerry Stevenson. Further, it was the trial court's incorrect jury charge, not any withheld information, which permitted the jury to convict Davila in spite of their belief that he only harbored the intent to kill a single person. For these reasons, even if the defense did not know of Stevenson's statements affirming his gang involvement, Davila would not be able to show materiality as required by *Brady.*

For this reason Davila abandons this claim.

Conclusion

As this petition demonstrates, Petitioner Davila's rights under the U.S. Constitution were violated and unremedied by the Texas courts.

RELIEF REQUESTED

Prayer for Relief

WHEREFORE, Petitioner respectfully prays this Court:

1. Order that Petitioner be granted leave to conduct discovery pursuant to Rule 6 of the Rules Governing § 2254 Cases and permit Davila to utilize the processes of discovery set forth in Federal Rules of Civil Procedure 26-37, to the extent necessary to fully develop and identify the facts supporting his petition, and any defenses thereto raised by the Respondents' Answer;

2. Order that upon completion of discovery, Petitioner be granted leave to amend his petition to include any additional claims or allegations not presently known to him or his counsel, which are identified or uncovered in the course of discovery and that Davila be granted to [sic] leave to expand the record pursuant to Rule 7 of the Rules Governing § 2254 Cases to include additional materials related to the petition;

3. Grant an evidentiary hearing pursuant to Rule 8 of the Rules Governing § 2254 Cases at which proof may be offered concerning the allegations of this petition;

4. Issue a writ of habeas corpus to have Davila brought before it to the end that he may be discharged from his unconstitutional confinement and restraint;

5. In the alternative to the relief requested in Paragraph 4, if this Court should deny the relief as requested in Paragraph 4, issue a writ of habeas corpus to have Davila brought before it to the end that he may be relieved of his unconstitutional sentences;

6. Grant such other relief as may be appropriate and to dispose of the matter as law and justice require.

WHEREFORE, PREMISES CONSIDERED, the Applicant DAVILA asks this Court to hold hearings, make its findings of fact and conclusions of law, and find that he was denied rights. He requests the Court to vacate his conviction and issue a writ to the Respondent, or the warden of the Polunsky Unit, ordering release of Davila from custody, or alternatively, to reverse Davila's conviction and order a new trial, or alternatively, to vacate his sentence of death and order a new trial on sentencing.

Respectfully submitted,

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COURT APPOINTED LAWYERS
FOR PETITIONER DAVILA

[Declaration Of Service And Verification Omitted]

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United States District Court,
N.D. Texas,
Fort Worth Division.

Erick Daniel DAVILA, Petitioner,
v.
William STEPHENS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division, Respondent.

Civil Action No. 4:13-CV-506-O.
|
Signed April 21, 2015.

Attorneys and Law Firms

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Katherine D. Hayes, Office of the Texas Attorney General, Austin, TX, for Respondent.

MEMORANDUM OPINION AND ORDER

REED O'CONNOR, District Judge.

Erick Daniel Davila ("Davila") petitions the Court for a writ of habeas corpus, contending that his conviction and death sentence are unconstitutional because (1) the evidence adduced at trial was insufficient to support his conviction; (2) he was denied effective assistance of counsel at trial, on direct appeal, and at state habeas proceedings; (3) the trial court erred by

admitting his three written statements admitting to the commission of the offense of capital murder; (4) the trial court erred by admitting his written statement admitting to the commission of an extraneous murder offense; (5) the trial court erred by denying Davila's Motion to Preclude the Death Penalty as a Sentencing Option and Declare Tex.Crim. Proc.Code 37.071 Unconstitutional; (6) the trial court erred by overruling Davila's objection to Texas's "10-12 Rule"; and (7) the trial court erred by incorrectly instructing the jury regarding the burden of proof on the mitigation issue. Having reviewed the record, the briefs, and the exhibits tendered by the parties, the Court concludes that Davila is not entitled to relief under the standards prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), DENIES the petition, and DISMISSES this action with prejudice.

I. BACKGROUND

In February 2009, Davila was convicted and sentenced to death for the 2008 murder of an elderly woman, Annette Stevenson, and her grandchild, Queshawn Stevenson, in Tarrant County, Texas. *State v. Davila*, No. 1108359D (Crim. Dist. Ct. No. 1, Tarrant Co., Tex. Feb. 27, 2009). The Texas Court of Criminal Appeals ("CCA") affirmed the conviction in an unpublished opinion on direct appeal. *Davila v. State*, No. AP-76,105, 2011 WL 303265 (Tex.Crim.App.2011). The Court takes the following recitation of facts from that opinion:

On April 6, 2008, eleven-year-old Cashmonae Stevenson, along with numerous friends and relatives, celebrated her sister Nahtica's ninth birthday at a "Hannah Montana" birthday party at her grandmother's home in the Village Creek Townhouses in Fort Worth. Except for Cashmonae's uncle, Jerry Stevenson, all of the guests were women and children. About 8:00 p.m., just as the fifteen children were eating ice cream and cake on the front porch, Cashmonae saw a black Mazda slowly drive by. Inside was a man holding a gun with "a red dot" on it. Cashmonae "felt in her stomach" that something bad was going to happen because "no one ever rolled by with a gun pointed towards our house." Her uncle Jerry said, "The fool has a K in the car." And then Cashmonae heard her grandmother, Annette Stevenson, say, "They trying to find trouble."

A few minutes later Cashmonae saw a man run across the field, stand next to the house in front of theirs, and start shooting with "the red dot" pointed at their porch. He kept shooting at them as the children and adults "stacked up on top of each other" as they tried to run through the front door. They were all screaming and trying to get to safe places inside. Cashmonae saw her uncle, Jerry Stevenson, lay his five-year-old daughter, Queshawn, down on the sofa. She was bleeding and looked dizzy. According to Jerry, "her guts was hanging out." After the gunshots ended, Cashmonae discovered that she had been shot in the elbow, the hand, and the shoulder. Nahtica and another little girl, Brianna, as well as

> Sheila Moblin, one of the adults at the party, had also been shot. Cashmonae's grandmother, Annette, had been killed, as had five-year-old Queshawn.
>
> . . .
>
> By the time the first police officer arrived, it was a chaotic scene. There was a dead woman – Annette Stevenson – in the back bedroom, a seriously injured child – Queshawn – on the couch in the living room, two more children with leg wounds in the dining room, blood splattered everywhere, and both adults and children screaming and trying to help or console the wounded and each other. Crime scene officers found four shell casings beside the air conditioning unit across the street and four more scattered in the street where the second series of shots had been fired. They photographed the bullet holes found all along the porch walls and in the windows of the Stevenson home.

Id. at *1-3. Following his appeal, Davila petitioned the United States Supreme Court for writ of certiorari, which was denied. *See Davila v. Texas*, ___ U.S. ___, 132 S.Ct. 258, 181 L.Ed.2d 150 (2011). While the appeal was pending, Davila's habeas counsel petitioned the convicting court for a writ of habeas corpus. The convicting court recommended that all claims be denied. Based on the convicting court's findings and conclusions and its own review of the record, the CCA denied relief in 2013. Ex parte Davila, No. WR-75356-01, 2013 WL 1655549 (Tex.Crim.App. Apr.17, 2013).

The Court appointed federal counsel, and Davila filed a petition for writ of habeas corpus and supporting brief on April 14, 2014 (ECF No. 16), which he amended on May 19, 2014 (ECF No. 17). Respondent filed its answer on September 4, 2014 (ECF No. 29), and Davila filed a reply on October 27, 2014 (ECF No. 33).

On May 19, 2014, Davila filed an Opposed Motion to Stay and Abet the proceedings, seeking to return to state court to exhaust his ineffective assistance of trial and appellate counsel claims. Mot. Stay, ECF No. 18. In its November 10, 2014 Order, this Court denied relief on the basis that Davila failed to establish good cause for his failure to exhaust the claims and because he failed to establish that the "unexhausted" claims were potentially meritorious. Order, Nov. 10, 2014, ECF No. 34. Davila additionally filed an Opposed Motion for Hearing on May 21, 2014, seeking an evidentiary hearing regarding the issue of whether any procedural default could be excused on the grounds of ineffective assistance of counsel rendered either on direct appeal or in state habeas proceedings. Mot. Hr'g, ECF No. 20. On November 10, 2014, this Court denied the motion without prejudice on the basis that Davila failed to identify facts that, if true, would entitle him to relief on his ineffective assistance of appellate counsel claim and on the basis that the Court had yet to address whether the state court adjudication was unreasonable. The habeas petition is now ripe for determination.

II. LEGAL STANDARD

This petition is subject to the AEDPA. *See* 28 U.S.C. § 2254. The Court will address the AEDPA standards of review where applicable to the issues raised. When a federal habeas petitioner challenges a prior state court adjudication on the merits, the AEDPA bars relitigation of the claim in federal court unless it (1) is "contrary to" federal law then clearly established in the holdings of the Supreme Court or "involved an unreasonable application of" such law, or (2) "is based on an unreasonable determination of the facts" in light of the record before the state court. *See* 28 U.S.C. § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 785, 178 L.Ed.2d 624 (2011). This determination is limited to the record that was before the state court that adjudicated the claim on the merits. 28 U.S.C. § 2254(d)(2); *Cullen v. Pinholster*, ___ U.S. ___, ___, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011). These conditions are meant to be difficult to meet and stop short of imposing a complete bar on the relitigation of claims already rejected in state proceedings. *Richter*, 131 S.Ct. at 786.

A state court's decision is "contrary to" Supreme Court precedent if the state court applies a rule that contradicts governing law or confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at an different result. *Coleman v. Thaler*, 716 F.3d 895, 901 (5th Cir.2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). A state court's application of law is "unreasonable" when the state court

identifies the correct governing legal principle but applies it unreasonably to the facts of a particular case. *Id.* at 901-02. The petitioner must show that the state court ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S.Ct. at 786-87; *see also White v. Woodall*, ___ U.S. ___, ___, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014). Thus, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 131 S.Ct. at 786; *Woodall*, 134. S.Ct. at 1702 (stating a "merely wrong" holding or "clear error" will not suffice).

Factual determinations in a state court's decision are presumed correct, and a petitioner bears the burden of rebutting them by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see Burt v. Titlow*, ___U.S. ___, ___, 134 S.Ct. 10, 15, 187 L.Ed.2d 348 (2013). A "decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." 28 U.S.C. § 2254(d)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). A "state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Titlow*, 134 S.Ct. at 15 (citing *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010)). The presumption of correctness attaches to explicit findings of fact as well as "unarticulated findings

which are necessary to the state court's conclusions of mixed law and fact." *Pippin v. Dretke*, 434 F.3d 782, 788 (5th Cir.2005) (quoting *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir.2003)). With this framework in mind, the Court turns to Davila's claims.

III. SUFFICIENCY OF THE EVIDENCE (CLAIM 1)

Davila first asserts that the evidence is legally insufficient to support his conviction for capital murder. Am. Pet. 36-45, ECF No. 17. Specifically, he contends that capital murder in Texas requires the specific intent to kill two people; thus, the evidence adduced at trial showing Davila only intended to shoot one individual is insufficient to support his conviction. *Id.* at 37. In response, Respondent argues that the evidence establishes that Davila intended to kill multiple gang members and the doctrine of transferred intent applies, which established sufficient intent to kill the two victims. Resp. 39, ECF No. 29. This claim was raised and rejected by the CCA on direct appeal.

A. Applicable Law

The standard set forth in *Jackson v. Virginia* applies where an appellant challenges the legal sufficiency of the evidence presented at the trial court supporting his conviction. 443 U.S. 307, 308, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see also Brooks v. State*, 323 S.W.3d 893, 895 (Tex.Crim.App.2010) ("[T]he *Jackson v. Virginia* legal-sufficiency standard is the only

standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt."). On federal habeas review, "the limited question before [the federal] court is whether the CCA's decision to reject [the petitioner's] sufficiency of the evidence claim . . . was an objectively unreasonable application of the clearly established federal law set out in *Jackson*." *Martinez v. Johnson*, 255 F.3d 229, 244 (5th Cir.2001). The evidence is sufficient to support the jury's verdict if, viewing the evidence in the light most favorable to the verdict, any rational juror could find the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Martinez*, 255 F.3d at 244 n. 21. The *Jackson* standard is used to determine if the amount of evidence satisfies the Due Process Clause, while state law determines the substantive elements that must be proven. *Coleman v. Johnson*, ___ U.S. ___, ___, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012) (per curiam).

Texas Penal Code Section 19.03(a)(7)(A) provides that "[a] person commits [capital murder] if the person commits murder as defined under Section 19.02(b)(1) and . . . the person murders more than one person . . . during the same criminal transaction." Tex. Penal Code Ann. § 19.03(a)(7)(A) (West 2013). A person commits murder under Section 19.02(b)(1) where he "intentionally or knowingly causes the death of an individual." *Id.* at § 19.02(b)(1). In addition, under Texas law, the doctrine of transferred intent provides

that a person may be held "criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . a different person or property was injured, harmed, or otherwise affected." *Id.* at § 6.04.

B. Evidence Presented

The CCA determined that there was "ample evidence in the record to support the jury's verdict that [Davila] intended to cause more than one death in his 'shoot em up' attack." *Davila*, 2011 WL 303265, at *4-5. Specifically, the CCA concluded that the evidence at trial established the following:

> The evidence shows that [Davila] intended to kill possible members of the Crips gang, but he mistakenly killed a grandmother and small child instead. As [Davila] himself explained, he went to "a shoot em up" in which he intended to kill "the fat dude in the middle of the street" and the three "guys on the porch." That is, he intended to shoot four males, not two females. But, under Texas law, the intent to kill four males will transfer to the unintentional killing of two females.
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> . . .
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> (1) [Davila] gave a written statement explaining that he intended to "get the fat dude" and who he mistakenly thought were three guys on the porch;

(2) Cashmonae testified (as did other witnesses) that [Davila] aimed the "red dot" at "different parts of the house" and at different persons;

(3) [Davila] used a high-powered SKS semi-automatic rifle with an infrared beam to fire between ten to fifteen bullets into the group of women and children on Ms. Stevenson's front porch;

(4) [Davila] fired a burst of bullets from one location across the street, then paused as he ran to the middle of the street and fired a second burst of bullets;

(5) [A witness] said that [Davila] looked "frustrated" after the first burst of fire when [Jerry Stevenson] had escaped into the house, so [Davila] moved and then fired a second burst at the remaining women and children;

(6) [Davila] used a rifle with an infra-red scope that would give him greater precision in shooting at what he intended to hit;

(7) His semi-automatic SKS required him to pull the trigger each time he intended to shoot; thus he intended to shoot his targets at least ten to fifteen different times;

(8) Expert testimony that [Davila's] choice of bullets, high-powered hollow-point bullets, was consistent with a shooter who wants to cause maximum damage or death to his intended target.

Id.

C. Analysis

Davila argues that the CCA's factual determinations were unreasonable. Am. Pet. 41, ECF No. 17. Specifically, Davila argues that the determination that "the jury's verdict showed Davila 'intended to cause more than one death in his 'shoot him up' attack'" is incorrect. *Id.* In support, he points to a note the jury sent during their deliberations. *Id.* The note stated: "In a capital murder charge, are you asking us did he intentionally murder the specific victims or are you asking us did he intend to murder a person and in the process took the lives of 2 others." Clerk's R. vol. 44 (Jury Note 2) 1931, ECF No. 10-44. Davila argues that this note "clearly established the jury believed Davila intended to murder 'a person.'" Am. Pet. 41, ECF No. 17. He further argues that the CCA improperly utilized his written statement "explaining that he intended to 'get the fat dude' and who he mistakenly thought were three guys on the porch" to establish that he intended to kill at least two individuals. *Id.* Davila argues that this was erroneous because Jerry Stevenson, whom Davila intended to kill, was the only adult male at the birthday party. *Id.* at 42. Davila further contends that the CCA incorrectly concluded that witness Cashmonae testified that Davila "aimed the 'red dot' at 'different parts of the house' and at different persons." *Id.* Finally, Davila argues that the CCA incorrectly summarized witness Eghosa Ogierumwense's testimony. *Id.* at 43-45. Although the CCA stated that Eghosa "said that [Davila] looked 'frustrated' after the first burst of fire when [Jerry Stevenson] had escaped into

the house, so [Davila] moved and then fired a second burst at the remaining women and children," Eghosa actually explained that the beam from Davila's weapon was first pointed on Stevenson and then was pointed on the windows of the home after Stevenson walked inside the home. *Id.* at 43.

The Court finds support in the record establishing that Davila had the intent to kill multiple individuals. Specifically, Davila's own written statement established that he intended to shoot four members of a rival gang. In addition, the testimony also established that Davila intended, at two separate times, to kill Jerry Stevenson. *See, e.g.*, *Ex Parte Norris*, 390 S.W.3d 338, 341 (Tex.Crim.App.2012) (noting defendant's intent to kill one individual on two separate instances was sufficient to establish capital murder under transferred intent theory). As a result, the CCA's decision to reject Davila's sufficiency of the evidence claim was not an objectively unreasonable application of the clearly established federal law set out in *Jackson*. *See Jackson*, 443 U.S. at 308. This claim is denied. *See* 28 U.S.C. § 2254(d)(1).

IV. ASSISTANCE OF TRIAL COUNSEL (CLAIMS 2 & 4)

Through state habeas counsel David Richards ("Richards"), Davila presented his ineffective assistance of trial counsel claim against Robert Ford and Joetta Keene ("trial counsel"). The habeas court granted Davila funding for a mitigation specialist,

conducted an evidentiary hearing, and issued Findings of Fact and Conclusions of Law, recommending that the claim be denied for a lack of merit. The CCA adopted the findings of fact and conclusions of law. *Ex parte Davila*, 2013 WL 1655549.

Davila now reasserts that his trial counsel rendered ineffective assistance by failing to properly investigate and present the mitigation case. Am. Pet. 46-79, ECF No. 17. Davila further maintains that Richards was ineffective during the state writ proceedings because Richards attempted to "wing it" at the state-writ hearing and inadequately presented the ineffective assistance of trial counsel claim. *Id.* at 91-102. In response, Respondent contends that the CCA reasonably rejected the ineffective assistance of trial counsel claim on the merits, and Davila has failed to meet his burden under § 2254. Resp. 40, ECF No. 29. The Court addresses each issue in turn.

A. Applicable Law

The clearly established federal law governing claims of ineffective assistance of trial counsel is *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Williams v. Taylor*, 529 U.S. 362, 398-99, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under *Strickland*, Davila must first demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. The objective standard of reasonable representation is defined by prevailing professional norms and is

necessarily a general standard. *See Bobby v. Van Hook*, 558 U.S. 4, 7, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009).

Restatements of professional standards, such as the American Bar Association guidelines, are "only guides" to what is reasonable and are properly considered only to the extent they describe the prevailing professional norms and standard practice, and the restatements are not so detailed that they "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* at 8-9 n. 1. The Constitution imposes "one general requirement: that counsel make objectively reasonable choices." *Id.* at 9. Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Pinholster*, 131 S.Ct. at 1403 (quoting *Strickland*, 466 U.S. at 690)). This standard not only gives trial counsel the benefit of the doubt, but affirmatively entertains the range of possible reasons counsel may have had for proceeding as they did. *Id.* at 1407.

Trial counsel's failure to reasonably investigate and present mitigating evidence to a sentencing jury, when such evidence would have been discovered by a reasonably competent defense attorney, amounts to ineffective assistance of counsel. *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Regarding counsel's duty to investigate, strategic decisions made by counsel following a thorough investigation are "virtually unchallengeable." *Strickland*, 466 U.S. at 690. "[S]trategic choices made after a less than

complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 691.

Generally speaking, complaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and allegations of what a witness would have stated are largely speculative. *See Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir.2010); *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir.1985). To prevail on this type of claim, the petitioner must name the witness, demonstrate that he was available to testify and would have done so, set out the content of the proposed testimony, and show that the testimony would have been favorable to a particular defense. *Id.* This showing is required for claims regarding uncalled lay and expert witnesses alike. *See, e.g.*, *Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir.2002).

Next, Davila must demonstrate that there is a reasonable probability that prejudice, sufficient to undermine confidence in the trial outcome, resulted from counsel's deficiency. *See Strickland*, 466 U.S. at 694. A "reasonable probability" of prejudice requires a substantial, not just a conceivable, likelihood of a different outcome. *Pinholster*, 131 S.Ct. at 1403. For claims that challenge counsel's sentencing investigation, the reviewing court reconsiders the evidence in aggravation against the totality of available mitigating evidence and determines whether there is a probability, sufficient to undermine confidence in the outcome, that the jury would have assessed a life sentence. *See Wiggins*,

539 U.S. at 534. After reviewing all of the evidence, the court must ultimately "decide whether the additional mitigating evidence was so compelling that there was a reasonable probability that at least one juror could have determined that because of the defendant's reduced moral culpability, death was not an appropriate sentence." *Id.* (internal quotation marks omitted).

B. Relevant Facts

1. *Trial Counsel's Investigation*

At the state writ hearing, trial counsel Joetta Keene testified that she spent an estimated time of 100 hours and co-counsel Robert Ford spent an estimated time of 80 hours on the mitigation investigation alone.[1] State Habeas Rep. R. (vol.2) 27, 37. Keene testified that she and Ford met with multiple doctors. *Id.* at 37. Keene noted that although she and Ford worked with psychologist Dr. Emily Fallis ("Dr.Fallis") in preparing a PowerPoint presentation for trial, Keene and Ford remained in charge of the mitigation investigation. *Id.* at 27-28, 37. Because Davila had made an attempted escape from jail, Keene stated she felt the mitigation case was the "real issue" for purposes of punishment. She believed the mitigation investigation should not be delegated because she had to build relationships with her witnesses first. *Id.* at 28. So, with the help of their fact investigator, Keene and Ford would find and talk

[1] Robert Ford was unavailable to testify as a witness during the state habeas proceeding as he passed away weeks before the state habeas proceeding. State Habeas Rep. R. (vol.2) 27.

to witnesses. They would then refer certain persons to Dr. Fallis, who would interview them from the psychologist's standpoint. *Id.* Davila was also submitted for a psychological evaluation with Dr. Kelly Goodness and neurological testing with Dr. Dennis Zgaljardic. *Id.* at 8, 30. Keene noted that she and Ford spoke with many of Davila's former teachers, his employer, and many of his family members.[2] *Id.* at 30, 33-34.

2. *Aggravating Evidence*

The State introduced evidence that Davila attempted to escape from jail while awaiting trial, committed an aggravated robbery and an additional murder only two days before this capital offense, and was convicted of burglary of a habitation two years earlier. The State also introduced evidence of a traffic stop where a gun and marijuana were found in Davila's car and testimony about his presence as a security threat in the jail.

The State first called Gabriel Ramos who testified about an incident wherein Davila and two other individuals held Ramos and Ramos's boss at gunpoint while demanding money. Trial Tr. vol. 20 at 65:17-24,

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[2] In her affidavit, Keene noted that she and Ford spoke with the following members of Davila's family: (1) his mother, Sheila Olivas; (2) his father, Mario Davila; (3) his sisters, Emily Davila, Cynthia Olivas, and Vivianna Olivas; (4) Emily Davila's mother-in-law, Lisa Wallace; (5) his girlfriend, Nicole Blackwell; (6) his aunts, Debra Jones and Angie Jones; and (7) Mario Davila's mother, brother, and niece. State Habeas Clerk's R. (vol.2) 274-76.

ECF No. 11-22. Ramos related that the robbery occurred at 5:00 in the morning on April 4, 2008. *Id.* at 104:7-19. He noted that Davila held a gun to Ramos's boss's head while demanding that he give Davila all of his money. *Id.* at 89:1-5. At one point, one of Davila's cohorts feared that the cops were near and advised that they should leave. *Id.* at 91:5-25. Davila then released Ramos's boss and started to retreat to his vehicle. *Id.* However, as he was doing so, he stopped and returned to Ramos's boss and again placed his gun on his head. *Id.* It was only at Davila's cohorts' insistence that Davila returned to his own vehicle and left the scene. *Id.* at 91:19-25, 92:1-2. Ramos noted that it appeared that Davila was in charge of the robbery. *Id.* at 106:17-20.

The jury next heard from Detective Thomas Wayne Boetcher. Detective Boetcher took Davila's written confession regarding the extraneous murder of Darrell Ford and read the written confession to the jury:

> On the first part of the month, it was 4 Trey Day, April the 3rd. That's how I remember the day. I went to the convenience store on East Lancaster by the French Quarters. A friend of mine named Taylor *[sic]* was with me. We call him T. He hangs around East Lancaster. He wears red. He is not put down with any particular set.
>
> I was driving Nichcole's car, and Taylor was with me on the passenger side. We both went into the store, and when I came out and

started up the car, I let my window down on the driver's side, and then this old school man walked up to me. He was a black male about 37 years old. He walked up to me on the driver's side of the car while I was sitting in it. He didn't say nothing to me, he just pulled a pistol out on me and pointed it to my head.

I thought I was going to die in the car. I wait- I waited for Taylor, and he didn't come out. I-I told-I told him what happened, and he was surprised. We hung around the back of the apartments and smoking. We stayed out there all day, and finally went to leave around 4:00 a.m.

. . .

When we went to leave, we seen the dude talking to the lady and another dude. We were in the front of the store. The store was closed, and I got the strap from the back of the apartments earlier to get him. I told Tyler to let me off on East Lancaster, and I was going to walk up there.

I went up to the store, and I was walking-as I was walking to him, the guy said to me, what's up? And then he said, What's up G Money? I said, What, and I let him have it. I shot him as he walked towards me, and then I went and got back in the car with Tyler and went home. I shot him because he had drawn down on me earlier in the day and pointed a gun at my head.

Trial Tr. vol. 21 at 21:8-25, 22:1-5, 23:3-16, ECF No. 11-23.

Tanna Martinez, who was with Darrell Ford when he was shot, next testified. Martinez noted that she was a prostitute and Ford dealt illegal drugs and "watched out" for Martinez while she "was jumping in and out of cars, making sure nothing happened to [her]." *Id.* at 72:3-12, 73:18-25. She testified that on the evening of April 3, 2008, she and Ford were standing on the corner after just having smoked crack, when a black vehicle drove past them. *Id.* at 76:1-6. Martinez noted that the she and Ford noticed the vehicle because they thought the driver was looking to pick up a prostitute. *Id.* at 77:16-25, 78:1-2. They noticed that when the vehicle first drove past them, it had two occupants, but when it drove past them again, it only had one. *Id.* She then related that she then saw a man, who she later identified as Davila, walking towards her and Ford. *Id.* at 78:20-24. Davila held his head down and did not say anything to them. *Id.* Ford then asked Davila, "What's up," and Davila did not respond. *Id.* Davila then pulled out a gun and Ford told Martinez to turn and run. *Id.* at 79:3-9. Martinez turned to run, but then fell. *Id.* She then heard "pow, pow" and turned back around and saw that Ford had begun to run, but then hit the ground. *Id.* She noted that Davila then walked over to Ford and shot him four more times in the back. *Id.* at 79:11-12.

The jury later heard that Davila had previously been convicted and sentenced to prison on May 11, 2006, for the offense of burglary of a habitation. Trial

Tr. vol. 22 at 30:1-5, ECF No. 11-24. Davila was sentenced to three years confinement. *Id.*

The jury also heard from Arlington Police Officer Michael Moses. Officer Moses testified that he conducted a traffic stop on February 12, 2006, involving Davila. *Id.* at 32:13-15. During the stop, the officer found a small amount of marijuana on Davila's person, a loaded 9-millimeter pistol under the front seat of Davila's vehicle, and a brick of marijuana in the back seat of the vehicle. *Id.* at 44:5-6, 44:16-24, 46:1-2. Officer Moses noted that while Davila was cooperative at the beginning of the traffic stop, his demeanor changed when he was placed in the back of the officer's car. *Id.* at 47:1-15. Davila became verbally abusive with the officers. *Id.* During the course of Davila's transportation to the jail, he was able to maneuver his handcuffs from behind his back to the front of his body, which posed a security threat. *Id.* at 57:6-15. The officer finally testified that although he would normally escort a detainee alone into the prison, the officer felt that Davila was a significant security risk, and the officer required four or five jailers to assist him in extracting Davila from the cop car and escorting Davila to the jail. *Id.* at 58:4-6.

Charles Norton, a detention officer at the Tarrant County Sheriff's Department, additionally testified. He discussed one incident wherein he told Davila, who was using the payphone, to hang up the call and return to his cell so that the inmates could be administered their meals. *Id.* at 105:19-24. In response, Davila became argumentative with the officer and refused to

end the phone call. *Id.* at 105:23-25. Davila then began "cussing out" the officer and eventually hung up the phone. *Id.* at 106:1417. He then stated, "You don't know who you're messing with, you need to check my resume." *Id.* at 106:20-24. Ultimately, Davila complied with the officer's commands. *Id.* at 108:1-14.

Several other officers testified regarding the security threat that Davila posed while he was incarcerated and awaiting trial. One officer testified that he noticed Davila's nails were long and filed to a point. *Id.* at 126:14-16. This posed a potential safety issue for the jail staff members because officers had been scratched by inmates in the past. *Id.* at 126:18-20. Another officer testified that during a routine inspection of Davila's cell, the officer found contraband in Davila's cell. *Id.* at 135:6-8. When the inspection ended, Davila was instructed to come to the door so that the officers could remove his handcuffs. *Id.* at 134:1-3. Davila moved the handcuffs from behind his back to his front, refused to allow the officers to remove the handcuffs, and became argumentative. *Id.* at 135:1-5. The officer eventually had to spray Davila with "OC Spray"[3] to get him to comply with his orders. *Id.* at 135:9-10. The officer noted that Davila's behavior after he was sprayed was unusual because while most inmates become "more humble and . . . embarrassed," Davila "was singing, making jokes and taunting other inmates still in their cell and other officers." *Id.* at 136:5-8. Another officer testified that when Davila was being transferred for a

[3] The officer testified that "OC Spray" is a form of pepper spray. *Id.* at 134:13-17.

trial court proceeding, a hairpin was found in Davila's breast pocket of his jumpsuit. *Id.* at 182:21-24, 186:2-3. The officer noted that the hairpin was considered contraband because there was a "[p]ossibility that the hairpin could be used in a set of handcuffs, to get out of locking devices." *Id.* at 183:23-25.

Finally, detention officers testified about Davila's attempted escape from the jail where he was held prior to trial. The first officer to testify, Michael Thompson, noted that he was in charge of escorting Davila and four other inmates to the gym for their state-mandated recreation period. *Id.* at 160:12-13. Once the inmates were secured within the west gym, the officer went to complete paperwork. *Id.* at 161:15-19. However, as he was completing the paperwork, the inmates got the officer's attention and asked to move to the east gym because the floor of the west gym was damp. *Id.* at 162:14-20. As the officer moved the inmates to the east gym, three of them (including Davila) attacked the officer by punching and kicking him multiple times. *Id.* at 164:23-25, 165:1-4. The inmates took the officer's wallet and removed his keys from his holster. *Id.* at 166:9-14. The inmates then demanded an escape route. *Id.* at 166:17-24. The officer sent the inmates down the fire escape, knowing that it would lead them to a dead end. *Id.* Once the inmates left, the officer attempted to summon help. *Id.* at 168:1-12. He additionally noticed that his partner, Teresa Otterson, was also laying face down in the hallway in a pool of her own blood. *Id.* at 169:12-15. A fellow inmate who witnessed the attack noted that the inmates were hitting, kicking, and

stabbing Officer Thompson. *Id.* at 115:1-3. He noted that as they were attacking the officer, they were saying, "I'll kill you, and you know, you don't know me, you don't know what I'm in here for. I have nothing to lose. How do you get out of this building?" *Id.* at 116:24-25, 117:1-2.

A nurse who responded to the scene first found Officer Otterson. The nurse noted that Officer Otterson was lying face down with her arms stretched in front of her in a large pool of blood. *Id.* at 230:9-14. Although the nurse attempted to call her name, she did not respond. *Id.* At this point, the nurse feared that she was dead. *Id.* at 230:22-24. Once Officer Otterson regained consciousness, she was very disoriented and "had no idea that she really was even hurt." *Id.* at 231:10-14. Although she "kept rubbing at her hand and saying . . . what is this, I'm just a mess, I've just got stuff all over me," she did not realize it was her own blood. *Id.* In addition, a maintenance worker employed through Tarrant County Facilities testified. He testified that he was working to replace some light bulbs within the jail facility and was riding on an elevator with Officer Otterson to retrieve the light bulbs. *Id.* at 243:2-4. As the elevator door opened, the maintenance worker noted that Officer Otterson first walked out and was struck by an inmate wearing a cast. *Id.* at 243:15-19. The maintenance worker attempted to help Otterson. *Id.* As he was attempting to help her, he noticed that several inmates in various stages of undress and partially covered in blood spatter were approaching him. *Id.* at 245:123. He then turned and ran back onto the

elevator. *Id.* at 247:1-8. An inmate then struck him in the face and broke his nose. *Id.* at 247:22-24. A crime scene investigator dispatched to the scene later found a shank[4] inside the gym. Trial Tr. vol. 23 at 70:13-6, ECF No. 11-25.

3. *Mitigating Evidence at Trial*

Trial counsel first presented Allen Dennis, the chief deputy over housing for the Tarrant County Corrections center. Dennis noted that he reviewed the reports authored by several officers regarding Davila's attempted escape and assault of corrections officers. *Id.* at 199:2-6. Based on his review, he determined that the pat down search of the inmates was inadequate, that Officer Thompson's radio had not been properly checked out, and that the east and west gyms had not been properly inspected. *Id.* at 200:5-24, 202:6-14. Dennis additionally noted that the job assignment process for detention officers changed after the incident such that officers were required to rotate their assignments on a regular basis. *Id.* at 203:11-19. Ultimately, Dennis determined that the incident occurred, at least in part, as a result of "complacent lack of safety practices by both the officers involved." *Id.* at 209:2-7. Notably, however, Dennis attributed the biggest factor driving the assault to the "fact that you had three very aggressive individuals that wanted to get out of jail, and they were

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[4] An officer defined a shank as "a piece of metal or something sharp, hard . . . wrapped with cloth at the bottom to protect from unintentional injuries by the user," which is typically used as a weapon. *Id.* at 70:24-25, 71:1-4.

willing to do just about anything to do that." *Id.* at 210:25, 211:1-3.

The jury next heard from Mario Davila, Davila's father ("Mario"). Mario noted that he was currently incarcerated and serving a 20-year sentence for murder. *Id.* at 220:10-17. Mario fathered five children, three of whom also spent time in prison. *Id.* at 223-24. He testified that he met Davila's mother when he was working in her father's mechanics garage. *Id.* at 225:11-13. At that time, he was around the age of twenty-four and she was thirteen. *Id.* at 242:1-5, 230:12-14. Mario testified that he had a somewhat tumultuous relationship with Davila's mother, Sheila Olivas, which was caused by Mario's drinking problem. *Id.* at 242:12-23. Mario was sentenced to prison when Davila was very young, and as a result, the burden to raise and care for Davila was largely placed on his mother. *Id.*

Next, Emily Davila ("Emily"), Davila's sister testified. She noted that she and Davila were fathered by Mario Davila. Trial Tr. vol. 24 at 13:20-25, ECF No. 11-26. Although she had written to her father, she had never met him. *Id.* She further testified about her and Davila's poor relationship with their mother, Sheila Olivas. When Emily was thirteen, her mother advised her and Davila that they were the product of a rape. *Id.* at 23:18-20. When she was sixteen, Emily stated that her mother kicked her out of her home, forcing Emily to move in with her boyfriend and his family. *Id.* at 17:16-23. Davila was kicked out of the home when he was fifteen; he moved in with a girlfriend and her family. *Id.* at 25:7-10. Before they left the home, Emily

and Davila worked at a grocery store to help their mother pay the household bills. *Id.* at 27:1-2. Emily further related that she and her mother had previously been in physical fights requiring police intervention and resulting in Emily being put in jail. *Id.* at 30:17-25. In describing the environment in which she and Davila grew up, Emily testified that she would frequently hear gunshots and "would see all kinds of stuff on the ground. Condom wrappers here and there, needles here and there." *Id.* at 38:14-16.

The jury next heard from Sheila Olivas ("Olivas"), Davila's mother. She testified that she was taken out of school when she was ten-years-old. *Id.* at 51:23-25. She explained that, when she was thirteen, her father "placed" her with Mario Davila in exchange for Mario giving Olivas's father money. *Id.* at 53:16-23. She later conceived both Davila and Emily as a result of Mario sexually assaulting her. *Id.* at 54:11-15. Olivas received no prenatal care during her pregnancy with Davila. *Id.* at 57:2-6. Although she would often attempt to leave Mario as a result of his violent, alcoholic tendencies, Olivas's family would always "push" her back with him. *Id.* at 54:24-25, 55:1-8. Olivas additionally testified that as they were growing up, her children often witnessed bouts of domestic violence between Olivas and her romantic partners, some of which required police intervention. *Id.* at 66:16-18. Regarding Davila, Olivas testified that he was diagnosed with ADHD[5] when he was a child and had very poor

[5] The term ADHD was later defined as "attention deficit hyperactivity disorder." *Id.* at 213:1-4.

vision. *Id.* at 69:22-24. He additionally had a difficult time controlling his temper. *Id.* at 99:22-25. Although he was prescribed Ritalin for his ADHD, Olivas quit administering the medication to him because "[w]hen he took it, . . . he was like a zombie." *Id.* at 70:12-17. As a student, Davila "had good grades until high school." *Id.* at 71:1-2. When he was twelve or thirteen, Davila began wearing colored clothing suggesting that he was involved in gang activity. *Id.* at 71:14-25. Olivas often picked Davila up from school and he was "beat up." *Id.* at 82:14-15. His teachers additionally reported that Davila "was exhibiting behaviors that are unacceptable in the classroom, and at times [was] endangering the lives of other students in [the] classroom." *Id.* at 100:4-8.

Davila's aunt, Debra Jones, also testified. Jones stated that she was Olivas's younger sister. *Id.* at 113:12. Jones and her two other sisters assisted Olivas in raising and caring for Davila and Emily. *Id.* at 120:17-19. At the age of fourteen, Davila moved in with Jones. *Id.* at 122:9-10. Jones noted that there were "issues" because Davila was "wearing red."[6] *Id.* at 122:17-22. Olivas sent him to live with Jones because she thought that Jones would be able to help Davila. *Id.* Jones noted that she attempted to help Davila by requiring him to attend church every week, having him go the Boys & Girls Club, and discussing gang-related issues with him. *Id.* at 123:7-14. Angela Jones, another

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[6] Jones testified that because Davila constantly wore red clothing, she was concerned he was involved in gang-related activity. *Id.* at 122:23-25, 123:1-2.

of Davila's aunts, further testified that one of her six children (Davila's cousin) also was a gang member-only he was a member of the Crip gang. *Id.* at 142:6-9.

Dr. Fallis, the psychologist who was hired by defense counsel to prepare a social history on Davila, also testified. In conducting her investigation, Dr. Fallis spoke with Davila, Olivas, Mario, Emily, and his aunt, Debra Jones. *Id.* at 184:17-25, 185:1-5. She also spoke with "a former teacher who remembered him from middle school, Lisa Walker [and] . . . someone who runs . . . a program through the Boys and Girls Club of Fort Worth and some program to keep kids outs of gangs. His name is Melvin Carter. And two of his associates." *Id.* She additionally reviewed Davila's school, medical, and penitentiary records. *Id.* at 184:5-10, 186:8-12. Dr. Fallis first noted that although Olivas received no prenatal care, Davila's birth was "normal." *Id.* at 190:7-10. Developmentally, Davila reached the early milestones, such as potty training, walking, and talking, at normal points in time. *Id.* at 191:11-20. When Davila first began his schooling, however, he began exhibiting behavioral problems, which included "[h]itting other kids, hitting his teacher, throwing furniture, running away from the teacher, interrupting the teacher, being very fidgety, just could not sit still. Being silly in the classroom. Having difficulty following directions." *Id.* at 192:7-11. His behavior issues were so significant that the school threatened to expel him from the first grade. *Id.* at 192:12-13. Davila was later diagnosed with ADHD and was prescribed Ritalin. *Id.* at 193:20-24. Although Davila's teachers reported that there was

a "significant improvement in terms of not just his behavior, but also his academic performance" as a result of the Ritalin, Olivas decided to discontinue the treatment. *Id.* at 194:1-3, 213:9-12. Davila's records indicated that he had other behavioral issues in the fifth grade and was sent to an alternative school in the tenth grade. *Id.* at 195:1-5.

Davila was relatively uninvolved in any type of extracurricular activities – "no sports, no clubs, or other groups, apart from one brief period of playing soccer" – during his younger years. *Id.* at 195:1519. Because he was not involved in pro-social activities, Dr. Fallis noted that Davila was more vulnerable to developing problems later on in his life. *Id.* at 195:20-23.

At the age of seven, Davila was administered an IQ test in which he performed significantly below average. *Id.* at 198:24. He also had very poor vision and was not encouraged or made to wear his glasses, which impaired his schooling. *Id.* at 200:4-8. Despite the fact that Olivas reported that he made excellent grades through elementary, middle, and high school, Dr. Fallis noted that Davila's records proved otherwise. *Id.* at 199:10-13. Instead, Davila's school records from fifth grade and on established that he received low grades, and sometimes failed his core classes. *Id.* at 201-03. Additionally, he received several failing grades on his state-mandated tests. *Id.* at 204:18-22. Dr. Fallis found that Olivas, who had only received a third-grade education, did not place an emphasis on education in Davila's life. *Id.* at 197:5-8. In support, she noted that

Davila was frequently absent from school.[7] *Id.* at 201:15-16, 205:16-21.

With respect to the quality of his relationships, Dr. Fallis noted that she could not find information suggesting that Davila had many friendships. *Id.* at 218:1-3. As a teenager, Davila dated and lived with much older women. *Id.* at 217:19-25 (noting that at age 15, Davila dated a 28-year-old woman and a 32-year-old woman). He also joined the Blood gang as a young teenager. *Id.* at 218:1114. Davila had very limited contact with his father as a child, and had no physical contact with his father after the age of two, when his father went to prison. *Id.* at 223:13-18. Dr. Fallis further detailed the pattern of crime within Davila's family: "Mario has brothers, these would be [Davila's] uncles, who are also incarcerated. Mario has fathered other children. These would be [Davila's] half brothers. They are also incarcerated. There's a lot of conflict amongst the family members who are not incarcerated. A lot of arguing and fighting. And there's also a significant history of substance abuse amongst the paternal relatives." *Id.* 225:23-25, 226:1-5. Davila further has a history of "mental health problems, substance abuse problems and learning problems." *Id.* at 252:13-25.

Ultimately, Dr. Fallis stated that Davila was vulnerable to several risk factors he experienced during his development:

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[7] For example, Davila missed 20 days of school during his fifth grade year and 40 days of school during his ninth grade year. *Id.* at 201:15-16, 205:16-21.

I believe that the risk factors that are pertinent in-in his case are the-the genetic factors that have to do with developing ADHD, the limited intellectual abilities. Being raised by a teenage mother. Having a limited attachment to her because he was the product of a rape. Having been exposed to neglect from his mother. Exposed to domestic violence in the home. Not having a father in the home. Finding out that the father he identified as his-as his dad was actually not his father. Finding out that his biological father was someone who is in prison for a violent crime.

Not having the medication that assisted him in his schoolwork and his behavioral problems, the Ritalin continued. Not having a parent or a caretaker that pursued the academic assistance that he needed through school.

Another risk factor would be not involving him in prosocial activities in his early childhood, his later childhood, his adolescence. Getting exposed to gangs in the school system and the neighborhood. And when the – the red flags arose that suggested he was getting gang – interested in gangs that there was not some intervention then.

I think the – the generational problems, the ways that his own mother was treated and then how that affected her parenting of him was a risk factor. The growing up in a family that was in the lower socioeconomic strata was a risk factor. Being in a neighborhood that

> tends to be a high crime area was a risk factor. And being involved in a gang was a risk factor.

Trial Tr. vol. 25 at 20:10-25, 30:1-15, ECF No. 11-27.

During closing arguments, the State argued that Davila's violent history-including the armed robbery, murder, and capital murder all committed within one week and his later attempted escape from jail-supported a finding that he would be a future danger to society. *Id.* at 54:9-23. In response, defense counsel argued to the jury that their focus should be not on what Davila had done in the past, but instead on his capacity to change in the future. *Id.* at 58:22-25, 59:1-18. Trial counsel drew on testimony elicited during cross-examination of the State's gang expert that many experiences Davila had in his life such as ADHD, his poor family structure, his relationship with his mother, and socioeconomic status were risk factors for gang activity. *Id.* at 63:19-25. In addition, trial counsel referenced the State's expert's testimony that most gang members change and "mature" out of their behavior. *Id.* at 64:12-17.

With respect to the mitigation issue, trial counsel, although admitting that Davila made horrible choices in committing the crimes, focused on the choices Davila did not make: his teenage mother, his conception as a result of sexual assault, having a father who spent the majority of his life in prison, having no familial support from his grandparents, being raised in an environment that did not value education, growing up poor, and his lack of involvement in extracurricular activities. *Id.* at

67-70. Ultimately, trial counsel argued that Davila was "worth life" and deserved the opportunity to have time to change while in prison. *Id.* at 72-73.

4. *Mitigating Evidence Presented to State Habeas Court*

During the state writ proceedings, Davila hired mitigation expert Toni Knox to conduct a mitigation investigation to determine whether trial counsel found and presented adequate mitigation evidence through trial counsel's investigation. Am. Pet. 46, ECF No. 17. Knox testified about her findings at the state writ hearing and provided an affidavit. *Id.* at 47.

Knox noted that trial counsel failed to attempt to contact Davila's maternal step-grandmother, Rosa Jones Nash and Davila's aunt, Sandra Kay Vargas. State Habeas Clerk's R. (vol.1) 35, 38. Each of these individuals, however, refused to sign an affidavit. *Id.* at 146. In fact, when one of Knox's associates, James Hughes, went to meet with Nash and Vargas, he was met by males who "informed [him], in what [he] perceived to be a threatening way, that [he] needed to leave as the family did not want to get involved in [Davila's] case as they were fearful of some type of gang retaliation and just did not want to be involved." *Id.*

Ethel Fay Jones-Silverio, Davila's aunt, provided an affidavit. *Id.* at 155. She noted that Mario Davila was a "gangbanger" who would steal from his family and did illicit drugs. *Id.* Olivas met Mario when he

worked in her father's garage and pursued him. *Id.* Olivas would often sneak out of her home to meet Mario and stay with him overnight. *Id.* at 156. Prior to her relationship with Mario, and at the age of twelve, Olivas had been sexually active with a man who was thirty-years-old. *Id.* According to Jones-Silverio, Olivas's testimony that she was "sold" by her father to Mario Davila was untrue. *Id.* Olivas did not treat Davila and his sister Emily in the same manner in which she treated her other children-she treated them like "outcasts." *Id.* As punishment, Olivas would often make Davila and his sister Emily stand in a corner for hours at a time. *Id.* at 157. Jones-Silverio saw permanent stains on the walls where Davila had cried on the wall and marks where his forehead had been pressed against the wall. *Id.* Olivas would also force Davila and Emily to work in the home and care for their younger siblings, and she would also force them to work outside the home so that she could take their paychecks. *Id.* at 158-59. These same facts were further established in an affidavit obtained from Lynda Jones Mireles, Davila's cousin. *Id.* at 163 (noting she saw tear streaks on the wall where Davila and Emily were forced to stand as punishment for not cleaning the home).

Olivas's sister-in-law, Elizabeth Olivas, also provided an affidavit. She reiterated that Olivas treated Davila poorly and would often hit him as punishment. *Id.* at 168. She noted that she was "sorry that [she] was unable to speak with [Davila's] defense attorneys at the time of his trial because [she] would have explained the effects that [Olivas] had on him growing

up." *Id.* at 169. Additionally, she stated that she blamed Olivas for what happened to Davila. *Id.*

Finally, Emily Davila's boyfriend's mother, Lisa G. Wallace provided an affidavit. She noted that Olivas was very manipulative and would force Emily and Davila to give her their paychecks. *Id.* at 173. Davila lived in Wallace's home for a very short period of time after he got out of prison. *Id.* She noted that when Davila lived with her, he "abided by [her] rules and seemed to be doing well." *Id.*

C. Analysis (Claim 2)

The state trial court entered findings of fact and conclusions of law, which were adopted, in whole, by the CCA. *See* State Habeas Clerk's R. (vol.2) 331-345; *Ex Parte Davila*, 2013 WL 1655549, at *1. The Court reviews the findings of fact and conclusions of law under the standards set forth in 28 U.S.C. § 2254(d).

1. *Strickland Analysis-Prong 1*

Davila fails to establish his claim under the first *Strickland* prong. There are countless ways in which to effectively represent a capital defendant. *See Pinholster*, 131 S.Ct. at 1403 (quoting *Strickland*, 466 U.S. at 689). Here, the mitigation team consisted of two seasoned defense attorneys, an investigator, and a psychologist. Trial counsel also consulted with multiple doctors who advised them about gang membership and gang activity. State Habeas Rep. R. (vol.2) 37. Trial

counsel made the decision to utilize Dr. Fallis as the mitigation specialist before the jury. The ABA Guidelines-which are not binding upon this Court-allow for the use of psychologists as mitigation specialists. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.4, cmt. 1003 (2003) (noting that counsel is free to allocate duties imposed by the guidelines to appropriate members of the defense team, with two exceptions inapplicable in the instant case). Trial counsel was also able to use the State's expert, Dr. Sabir, to elicit helpful information to explain Davila's risks for gang involvement. Additionally, although Davila's Aunt Ethel Jones did provide an affidavit, she refused cooperate with trial counsel and did not want to testify at the time of trial. State Habeas Rep. R. (vol.2) 113-114. Keene also noted that both she and Ford talked with Lisa Wallace and sought her trial testimony, however, Wallace did not want to participate in the trial. *Id.* at 115. The Court finds that trial counsel's performance did not fall below a constitutionally acceptable level; thus, Davila's claim fails. *See Strickland*, 466 U.S. at 716. However, even if trial counsel's performance were deficient, Davila still cannot establish prejudice under prong two.

2. *Strickland Analysis-Prong 2*

Here, as the trial court appropriately found, most of the evidence set forth in Davila's habeas petition was cumulative of the evidence presented at trial. During the sentencing phase, the jury heard that Davila did not form a normal bond with Olivas, and that

Olivas treated Davila and his sister Emily in a neglectful and abusive manner. This was established through testimony regarding (1) Olivas being "sold" to Davila's father when she was thirteen and raising Davila and Emily without their father; (2) the role Davila and Emily had to pay [sic] in helping to financially support the family; (3) the bouts of physical violence between Emily and Olivas; (4) the fact that Olivas advised Davila and Emily at an early age that they were conceived through sexual assault; (5) the alcohol abuse and incarceration of Davila's father early in Davila's life; (6) Olivas kicking Emily and Davila out of the home when they were young teenagers; (7) Olivas failing to keep Davila properly medicated and not requiring him to wear his eyeglasses despite his poor vision; and (8) an extended family culture of crime and incarceration. To the extent new evidence from Olivas's relatives suggests that Olivas minimized her wrongdoing before the jury, the jury heard Dr. Fallis's testimony, which had the same effect. The jury was adequately informed of the abusive, neglectful, and manipulative environment in which Davila lived as a child. As a result, Davila failed to make the requisite showing that the additional mitigation evidence undermines confidence in the verdict. Courts must be "particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Skinner v. Quarterman*, 576 F.3d 214, 220 (5th Cir.2009).

Further, not all of the witnesses discovered through the state habeas investigation would have provided helpful testimony at trial. Two of the individuals whom Knox identified – Rosa Nash Jones and Sandra Kay Vargas – refused to provide an affidavit to Knox. In fact, when Knox's associate attempted to meet with Jones and Vargas to secure their affidavits, he was threatened by their male family members and told that Jones and Vargas would not provide an affidavit for fear of gang retaliation. Furthermore, Ethel Fay Jones-Silvero described Davila's gang activity when he lived in her home. She stated she came home to find red scarves hanging all over her apartment. She confronted Davila and his then live-in stripper girlfriend, stating that they could no longer stay with her because she feared retaliation from a rival gang.

In addition, whatever mitigating impact the additional information may have had on the jury would have been overwhelmed by the State's aggravating evidence. The jury learned that Davila posed a security threat to detention officers on several occasions when he was incarcerated. In fact, while he was incarcerated in the time leading up to trial, he and three other inmates attempted to escape from jail by brutally beating two guards and a maintenance worker. Each of the guards spent a considerable amount of time off of work as a result of the injuries they sustained in the attack. Additionally, the jury learned of Davila's violent criminal history including an instance where he and two of his cohorts robbed two individuals at gun point in the week prior to the capital murder. Other witnesses also

testified about the cold-blooded murder of Darrell Ford committed only days prior to the instant capital murder. One witness noted the dead look in Davila's eyes after he shot and killed Ford.

The minimal impact the additional mitigating evidence may have had on the jury would have also been overshadowed by the brutal facts of the murder. *See Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir.1999). Brandishing a high-powered SKS semiautomatic weapon, Davila opened fire into a group of several women and fifteen children who were celebrating a child's birthday party. Davila shot and killed a grandmother and a five-year-old girl. He injured three other children and an adult, who, through no act of Davila's, managed to survive. Comparing the mitigating and aggravating evidence, the Court finds that there is no "reasonable probability that, absent the error, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Sonnier v. Quarterman*, 476 F.3d 349, 356-57 (5th Cir.2007) (citing *Strickland*, 466 U.S. at 695).

Defense counsel's closing argument to the jury revolved around Davila's capacity to change for the better. However, further evidence of how bad Davila's childhood was may have only cemented in the jury's mind his inability to change and would have run counter to the chosen defense theory. *See Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir.2012), *cert. denied*, ___ U.S. ___, 133 S.Ct. 1244, 185 L.Ed.2d 190 (2013) (concluding counsel's decision not to offer evidence of a defendant's

troubled, impoverished, and disadvantaged background was reasonable because the evidence could suggest he was a product of his environment and therefore likely to be dangerous in the future). Further, the facts that Emily was raised under the same circumstances as Davila and yet managed to live her life differently, would dilute the mitigating impact of any additional "difficult-childhood" evidence. *Guevara v. Stephens*, No. 13-7003, 2014 WL 3894303, at *5 (5th Cir.2014) (holding that any information about Guevara's difficult life in El Salvador would have been undermined by, among other things, his brother's clean record despite their shared childhood).

In sum, considering all of this evidence in its totality, the Court's confidence in the verdict is not undermined. *Cf. Wiggins*, 539 U.S. at 535 (reciting "powerful" overlooked mitigation evidence of severe privation and abuse while in care of an alcoholic, absentee mother; physical torment, sexual molestation, and repeated rape while in foster care; periods of homelessness; and diminished mental capacities); *Escamilla v. Stephens*, No. 12-70029, 2015 WL 680405, at *5 (5th Cir.2015) (affirming denial of ineffective assistance of counsel claim after finding no prejudice in case where no mitigation investigator was hired). The Court finds that the CCA's determination did not result in a decision that was contrary to, or involved an unreasonable application of clearly established federal law; nor did it result in a decision based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(1)-(2). Claim Three is denied. *See id.*

D. State Habeas Counsel's Performance (Claim 4)

In Claim Four, Davila argues that state habeas counsel was ineffective during the state habeas proceedings by failing to properly litigate the ineffective assistance of trial counsel claim. Am. Pet. 91-102, ECF No. 17. Specifically, he states that counsel was "ineffective for failing to subpoena any of the witnesses (other than Toni Knox) to testify at the state writ hearing," and was "further ineffective for failing to gain anything more than a passing familiarity with the facts, hoping instead to 'wing it' by parroting Ms. Knox's report." *Id.* at 91-92. He appears to assert that, under *Martinez v. Ryan*, state habeas counsel's ineffectiveness precludes AEDPA deference and, perhaps, allows this Court to consider new evidence not presented in state court.[8] *See Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012); *Trevino v. Thaler*, ___ U.S. ___, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013).

The ineffective assistance of trial counsel claim was previously adjudicated on the merits in state court. The "new" evidence presented to this Court in the form of an additional affidavit from Toni Knox does not render the claim unexhausted. *Ward v. Stephens*, 777 F.3d 250, 258 (5th Cir.2015). Because the claim is exhausted, there is no procedural bar asserted, and

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[8] To the extent Davila may be asserting the ineffective assistance of state habeas counsel as a substantive claim for relief, it is barred by Section 2254(i). 28 U.S.C. § 2254(i) (providing that the ineffectiveness or incompetence of counsel during state collateral post-conviction proceedings shall not be a ground for relief).

Martinez does not apply. *Brown*, 684 F.3d at 489 & n. 4. Moreover, the Court's review of the state court decision must be based only on the evidence that was before the state court. *Pinholster*, 131 S.Ct. at 1398. For the reasons previously discussed, the Court finds that the state court's rejection of the ineffective assistance of trial counsel claim was not unreasonable. *See supra* Part IV.C. The Court denies Claim Four.

V. ASSISTANCE OF APPELLATE COUNSEL (CLAIMS 3 & 4)

Through appellate counsel Mary Thornton ("Thornton"), Davila filed a direct appeal with the CCA. In the appeal, Davila raised fourteen points of error. After reviewing the merits of Davila's claims, the CCA affirmed Davila's conviction and sentence in an unpublished, unanimous opinion. *Davila v. State*, No. AP-76,105, 2011 WL 303265 (Tex.Crim.App. Oct.3, 2011).

In Claim Three, Davila now contends that Thornton failed to recognize and raise the claim that Davila was convicted through the use of an improper jury instruction. Am. Pet. 81-90, ECF No. 17. Respondent argues that the claim against Thornton is unexhausted, procedurally defaulted, and meritless because the jury instruction was proper. Davila asserts that any default may be excused because appellate counsel and state habeas counsel were both ineffective. *Id.* at 89-92, 97.

A. Procedural Bar

Generally, a federal court will not review the merits of a claim that a state court declined to hear as a result of the petitioner's failure to abide by state procedural rules. *Martinez*, 132 S.Ct. at 1316. This general rule is "designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Id.* An exception exists to the general rule, however, if the petitioner can establish a showing of cause and prejudice. *Id.*

Here, Davila claims that the exception set forth in *Trevino*, ___U.S. ___, 133 S.Ct. 1911, 185 L.Ed.2d 1044, excuses his procedural default of the ineffective assistance claim against Thornton. *See* Am. Pet. 89-92, ECF No. 17. The Court previously determined that Davila's third claim appeared to be unexhausted and procedurally barred under *Coleman v. Thompson* because Texas's subsequent writ bar would prevent him from presenting the claim now in state court. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); Mem. Op. & Order, Nov. 10, 2014, ECF No. 35. The Court also rejected his assertion that *Trevino* has been extended to excuse the default of claims against appellate counsel. *See Reed v. Stephens*, 739 F.3d 753, 778 n. 16 (5th Cir.2014). Finally, the Court held that ineffective assistance of appellate counsel cannot excuse the procedural default of a claim against said appellate counsel for the simple reason that such claims do not exist to be raised on appeal.

They are logically raised, as Davila asserts, in state habeas proceedings.

Thus, the ineffective assistance claim against Thornton is barred, and *Trevino* does not provide an avenue for excusing the procedural default. Assuming, however, that Davila can avoid procedural default, the claim against Thornton is denied on the merits for the reasons discussed below. *See* 28 U.S.C. § 2254(b)(2) (stating that habeas relief may be denied on the merits, notwithstanding petitioner's failure to exhaust).

B. Appellate Counsel's Representation

Davila argues that Thornton was ineffective because she failed to challenge an improper statement of law given in response to the jury's question about transferred intent.

1. *The Instructions*

At trial, the jury was given the following instructions regarding capital murder:

> A person commits an offense of "capital murder" if he commits murder and murders more than one person during the same criminal transaction. A person commits an offense of "murder" if he intentionally or knowingly causes the death of an individual.
>
> . . .
>
> A person acts "intentionally," or with intent, with respect to a result of his conduct when it

> is his conscious objective or desire to cause the result.
>
> A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> . . .
>
> Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm; and both murders were committed during the same criminal transaction, then you'll find the Defendant guilty of the offense of capital murder.

Trial Tr. vol. 20 (Court's Charge) at 5-8, ECF No. 11-22. During their deliberations, the jury sent a note to the trial court and asked the following:

> We need a clarification of the capital murder charge. In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others.

Clerk's R. vol. 9 (Jury Note 2) 1931, ECF No. 10-44. The trial court responded first with the following supplemental instructions:

> MEMBERS OF THE JURY:
>
> With regard to the charge of capital murder, the definitions of "intentionally" and "knowingly" on page 1 define the mental states referred to in the application paragraph on the top of page 2. These portions are repeated below:
>
> A person acts "intentionally," or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.
>
> A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of capital murder as charged in the indictment and next consider the lesser included offenses of murder.

Clerk's R. vol. 9 (Resp. Note 2) 1932, ECF No. 10-44. The trial court also sent a second supplemental response to the jury (of which Davila now complains). It read:

The Court gives the additional charge on the law as follows:

> "A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, harmed, or otherwise affected."

Id. at 1933. Trial counsel objected to the second supplemental charge and asked the trial court to instead "send the original response the Court had regarding intentionally and knowingly . . . [a]nd wait . . . until the jury indicates they can't reach . . . a resolution. And then at that point, submit the other special charge, if it's called for." Trial Tr. vol. 20 at 53, ECF No. 11-22. The trial court overruled the objection and sent the instruction to the jury. *Id.*

2. *Analysis*

In reviewing an ineffective assistance of appellate counsel claim, a court must determine (1) whether appellate counsel's performance was deficient, and (2) whether appellate counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. To establish deficient performance, a petitioner must show that "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Smith v. Robbins*, 528 U.S. 259, 287, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). To show prejudice, the petitioner must establish "a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal." *Id.* "Counsel need not raise every nonfrivolous ground of appeal, but should instead present '[s]olid, meritorious arguments based on directly controlling precedent.'" *Schaetzle v. Cockrell*, 343 F.3d 440, 445 (5th Cir.2003) (citing *United States v. Williamson*, 183 F.3d 458, 463 (5th Cir.1999)).

Davila argues that the trial court's second supplemental charge "contained an incorrect statement of the law because it failed to recognize that in Texas one must have the specific intent to murder at least two people to be guilty of capital murder; it is not enough that a person attempted to murder a single person, and accidentally killed two." Am. Pet. 82-83, ECF No. 17. Davila asserts Thornton was ineffective for failing to raise this issue on direct appeal.

The language given in the trial court's second supplemental instruction is taken from section 6.04 of the Texas Penal Code, which reads "[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . a different person or property was injured, harmed, or otherwise affected." Tex. Penal Code Ann. § 6.04 (West 2013). Trial counsel objected to this instruction on the basis that the trial court should delay the charge until after the jury deliberated further, not on the basis that the instruction was an incorrect statement of law.

Respondent argues that this failure to object waived any error for appeal and that Thornton cannot be ineffective for failing to raise a claim that was not preserved for appeal in the first instance. Resp. 61, ECF No. 29. Davila argues that trial counsel's failure to object does not preclude appellate review of jury charge error, but only increases the degree of harm necessary for reversal. Am. Pet., 85. Specifically, Davila argues that, under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App.1985), jury charge error that is not preserved requires "egregious harm" for reversal, as opposed to a "some harm" standard when the error is preserved. As explained below, the Court finds no error in the charge and that any alleged error did not result in harm under either *Almanza* standard.

A Texas trial court may instruct the jury on the law of transferred intent as applied in a capital murder prosecution. *See Roberts v. State*, 273 S.W.3d 322, 331 (Tex.Crim.App.2008). Davila argues that the second

supplemental instruction in this case was erroneous only because it violated the rule in *Roberts* that a defendant convicted of multiple-murder capital murder must have the necessary mental state (intent or knowledge) with respect to the number of victims killed. To ascertain whether the jury instruction was error, the Court examines the "charge as a whole instead of a series of isolated and unrelated statements." *Dinkins v. State*, 894 S.W.2d 330, 339 (Tex.Crim.App.1995). The "transferred intent" instruction was not given to the jury in isolation; it was given to the jury along with the language taken from the court's charge that repeated the statutory definitions for "intentionally" and "knowingly" as well as the application paragraph for capital murder. Clerk's R. vol. 9, 1932-33, ECF No. 10-44. In Texas, the application paragraph is the portion of the charge that authorizes conviction. *Yzaguirre v. State*, 394 S.W.3d 526, 530 (Tex.Crim.App.2013). The application paragraph for capital murder clearly required that the jury find Davila caused two intentional or knowing deaths in the same criminal transaction. In the event the jury found that Davila killed only one person, the application paragraph did not allow the jury to convict Davila of capital murder. Thus, the jury charge, taken as a whole, does not violate the rule in *Roberts*.

More to the point, the CCA specifically distinguished the facts of this case from *Roberts*, where the victim was a woman who, unknown to the defendant, was pregnant. The CCA noted that, in contrast, Davila intended to kill "the fat dude in the middle of the

street" and three "guys on the porch," or, in other words, "four males, not two females." *Davila*, 2011 WL 303265, at *4. Any error in the charge was, therefore, harmless, because *Roberts* is not implicated: Davila intended to kill more people than he actually did.

Given the foregoing, the record does not show that Thornton unreasonably failed to discover a non-frivolous issue for appeal and does not show that the issue would have prevailed on direct appeal. Claim Three and Four are denied.

VI. FOURTH & FOURTEENTH AMENDMENTS-ADMISSION OF WRITTEN STATEMENTS (CLAIMS 5 & 6)

Davila next contends that the trial court erroneously admitted three of his written statements admitting to the commission of the capital murder offense and another of his statements admitting to the commission of an extraneous murder offense. Am. Pet. 103, ECF No. 17. Davila contends that the admission of these statements was erroneous under the standard set forth in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and against his rights under the Fourth and Fourteenth Amendments to the United States Constitution. *Id.* In response, Respondent argues that this Court is prevented from reviewing such alleged error under *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), because Davila had a "full and fair opportunity to litigate his Fourth Amendment claim [in state proceedings] and

exercised the opportunity to do so." Resp. 68-69, ECF No. 29. In reply, Davila contends that *Stone* does not apply. Reply 26-31, ECF No. 33.

A. Applicable Law

In *Stone v. Powell*, the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Davila argues that the Supreme Court's holding in *Stone* does not apply in capital cases, and that the Supreme Court has exclusively applied the rule in non-capital cases. Reply 27, ECF No. 33. However, the Fifth Circuit has applied *Stone* to capital cases involving the death penalty and determined that it was prevented from reviewing a petitioner's Fourth Amendment claim as a result. *See ShisInday v. Quarterman*, 511 F.3d 514, 524-25 (5th Cir.2007) ("The Fifth Circuit applies the [*Stone*] bar as long as the state gives the defendant an opportunity to litigate the issue, whether or not the defendant takes advantage of the opportunity.") (citing *Janecka v. Cockrell*, 301 F.3d 316, 320-21 (5th Cir.2002)); *Busby v. Dretke*, 359 F.3d 708, 722 (5th Cir.2004) (noting Fourth Amendment claims are not cognizable in federal habeas corpus proceedings pursuant to *Stone*); *Jones v. Johnson*, 171 F.3d 270, 278 (5th Cir.1999) ("The state provided an opportunity for full and fair litigation of [petitioner's] fourth

amendment claim prior to trial; we cannot reexamine this claim on federal *habeas* review."). The Court now turns to a review of the state court proceedings to determine whether Davila received a full and fair opportunity to litigate the Fourth Amendment issues of which he now complains.

B. Analysis

The Supreme Court in *Franks v. Delaware* held that a defendant may challenge an affidavit supporting a search warrant on Fourth Amendment grounds if the defendant establishes that (1) misrepresentations within the affidavit are the product of "deliberate falsehood or deliberate disregard for the truth," and (2) that the statements were necessary to establish probable cause. 438 U.S. 154, 171-72, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Here, during the state court proceedings, Davila moved to suppress "any and all oral and written statements of the Defendant in this cause, which were made to agents of the State." Clerk's R. vol. 1 (Mot. Suppress Statements), ECF No. 10-3. Davila further moved to suppress "the arrest warrant in this cause based on the affiant's knowing or intentional false statements or based on the affiant's disregard for the truth in making false statements." Clerk's R. vol. 9 (Mot. Suppress Arrest Warrant), ECF No. 10-44 (emphasis removed). The state trial court held a hearing and heard evidence regarding the validity of the arrest warrant and the voluntariness of the statements Davila gave while in custody. Trial Tr. vol. 16 at 170-288, ECF No. 11-18. The state trial court overruled

each of Davila's motions regarding the validity of the arrest warrant and the voluntariness of his statements. *Id.* at 244:19-21, 299:2-6. Later during his trial, Davila again objected to the validity of his arrest warrant. *Id.* at 37:9-16. The state court provided an alternative basis for its original ruling denying Davila's motion to suppress. *Id.* at 37:20-25, 38:1-20. The issue was then submitted to the jury. The jury was instructed that, if they had a reasonable doubt about whether the affidavit for arrest contained sufficient probable cause to support Davila's arrest, they could not consider the arrest or any evidence derived from it. Clerk's R. vol. 9, 1923-24, ECF No. 10-44. The trial court's ruling was affirmed on appeal.

Because Davila was afforded a full and fair opportunity to litigate the Fourth Amendment issue, and did in fact litigate the issue, the Court finds that *Stone* applies to bar this Court's review of the issue in the instant federal habeas proceedings. *Stone*, 428 U.S. at 494. As a result, the Court denies Claims Five and Six. *See id.*

VII. FIFTH, SIXTH, & FOURTEENTH AMENDMENTS-ADMISSION OF WRITTEN STATEMENTS (CLAIMS 7 & 8)

Davila next contends that the trial court erroneously admitted all four of his written statements because they were made involuntarily, in violation of the Fifth, Sixth, and Fourteenth Amendments. Am. Pet. 111, ECF No. 17. He argues that the statements were

not given voluntarily because, as he was interrogated for seven hours, he did not have anything to eat or drink and did not use the restroom. *Id.* at 114-115. Respondent maintains that the statements were not coerced and were instead offered voluntarily. Resp. 76, ECF No. 29. Alternatively, Respondent states that even if the statements were obtained in violation of Davila's Fifth Amendment rights, "the Court must still deny relief because the admission did not have a substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 77. This claim was raised and rejected on direct appeal; thus, AEDPA deference applies.

A. Applicable Law

In determining the voluntariness of a confession under the Fifth Amendment, a reviewing court applies the "totality of the circumstances" approach. *Rogers v. Quarterman*, 555 F.3d 483, 491 (5th Cir.2009). That is, the court considers "the suspect's age, experience, education, background, intelligence, and whether the suspect has the capacity to understand the warnings given to him, the nature of his rights, and the consequences of waiver." *Id.* The court further considers "[t]he circumstances of the interrogation, such as its length, location, and continuity." *Id.* "A statement is involuntary if there existed official, coercive conduct that made it unlikely the statement was a product of the individual's free choice." *Id.* The Supreme Court has opined that "cases in which a defendant can make a

colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n. 20, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984).

"The voluntariness of a confession is ultimately a legal determination . . . [that] may also involve subsidiary factual determinations and mixed issues of law and fact." *Barnes v. Johnson*, 160 F.3d 218, 222 (5th Cir.1998). As a result, this Court will defer to the state court's determination of voluntariness as long as it was not "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.*; 28 U.S.C. § 2254(d)(1).

B. The Interrogation

In its analysis, the CCA set forth the following facts surrounding Davila's written confessions:

> Detective Johnson testified that [Davila] was arrested and brought to the police station at about 1:40 p.m. on April 8th. Detectives Johnson and Boetcher met with him in an interview room where [Davila's] handcuffs were removed and he was placed in leg cuffs. He began the interview by asking [Davila] if he wanted "anything to eat or drink or anything like that. He said no. I do it that way every time. And then I advised him of his Miranda rights." [Davila] told Detective Johnson that he understood his rights and that "he freely,

intelligently and voluntarily waive[d] those rights" and agreed to talk with the officers. "He was very relaxed. Just sat there kind of casual." [Davila] gave his first statement beginning at 4:00 p.m. and ended it at 4:25. He gave the second statement beginning at 6:47 p.m. and completed it at 7:22. The officers began taking the third statement at 7:38 p.m. and concluded it at 8:12. Detective Johnson said that he did not do anything to deny [Davila] his basic needs, did not prevent him from having liquids or food, and did not prevent him from going to the restroom. He took a picture of [Davila] lounging casually in his chair in the interview room. [Davila] does not appear to be under any stress or duress.

On cross-examination, Detective Johnson again said that [Davila] appeared very relaxed; "[t]he whole thing was extremely friendly." [Davila] "never asked to go to the bathroom"; he never asked for fluids or food. Detective Johnson reiterated that he had offered, but [Davila] turned him down.

Detective Boetcher also testified and said that [Davila] gave his fourth statement beginning at 8:45 p.m. and completed it at 9:06. He said that [Davila] had used the restroom, but he did not specify when.

The trial judge entered oral findings into the record and stated, inter alia,

> [Davila] was offered nothing in exchange for these three statements. There was no force, threats, or coercion made by the

> police. He was lucid. Did not appear intoxicated. Never asked for a-food or for anything to drink.
>
> The court finds that the statements are freely and voluntarily made and are admissible.

Davila, 2011 WL 303265, at *7-8.

C. Analysis

Here, both state courts determined that Davila's confession was made voluntarily and knowingly without threats or coercion. The Court defers to those determinations unless Davila can prove otherwise by clear and convincing evidence. In his briefing, Davila again argues that because he was questioned for seven hours and "did not ask to use the restroom and was not given anything to eat or drink" his confession was involuntary. Am. Pet. 113, ECF No. 17. He fails, however, to establish how those facts demonstrate the involuntariness of his confession or offer any additional evidence of coercive or improper activity. Davila simply asks this Court to disagree with the state court's ruling by rearguing the issues. The state trial court determined that Davila was offered nothing in exchange for the first three statements he gave; that the police did not force, threaten, or coerce Davila's confessions; that he was lucid and did not appear intoxicated; and that he never asked for food or anything to drink. Trial Tr. vol. 16 at 302:22-25, 303:1-3, ECF No. 11-18. Regarding the fourth statement, the state trial court found that

Davila "[a]gain during that period of time, . . . requested nothing" and that the statement was given freely and voluntarily. *Id.* at 303:12-13, 16-18. A state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Because Davila has failed to establish that the state court unreasonably rejected his claim that police coercion rendered his confession involuntary, Claims Seven and Eight are denied. *See* 28 U.S.C. § 2254; *Shisinday v. Quarterman*, No. H-06-814, 2007 WL 776680, at *23 (S.D.Tex.2007).

VIII. CONSTITUTIONALITY OF TEXAS CODE OF CRIMINAL PROCEDURE ARTICLE 37.071 (CLAIM 9)

Davila contends that the trial court erred by denying Davila's motion to preclude the death penalty as a sentencing option and declare Texas Code of Criminal Procedure Article 37.071 unconstitutional. Am. Pet. 116, ECF No. 17. Specifically, he argues that Article 37.071 is unconstitutional because it "allows for a death sentence without grand jury review of the punishment special issues in violation of the Fifth and Fourteenth Amendments." *Id.* In response, Respondent states that the Constitution does not require Texas's special sentencing issues to be presented in the indictment before the grand jury. Resp. 77, ECF No. 29. The state court rejected this claim on the merits on direct appeal.

A. Analysis

The Fifth Amendment to the United States Constitution provides, in relevant part, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." U.S. Const. amend. V. In *United States v. Robinson*, the Fifth Circuit held that, with respect to federal cases, "the government is required to charge, by indictment, the statutory aggravating factors it intends to prove to render a defendant eligible for the death penalty, and its failure to do so . . . is constitutional error." 367 F.3d 278, 284 (5th Cir.2004).

Davila argues that the *Robinson* holding extends to state-court prosecutions and requires that the aggravating and mitigating factors that a jury must consider in the sentencing phase of trial must be alleged in the indictment. Am. Pet. 117-18, ECF No. 17. Davila further asserts that "[r]elying on the Supreme Court's decision in *Ring v. Arizona*, the court in *Robinson* held that the Fifth Amendment demands that aggravating factors that render a defendant eligible for the death penalty are, in fact, elements of the offense," thus, "the government is required to charge, by indictment, those statutory aggravating factors." *Id.* at 116-17. In turn, Respondent contends that the *Robinson* holding only applies to federal-court prosecutions. Resp. 78, ECF No. 29. Further, "[t]he special issues addressed at the punishment phase have nothing to do with the eligibility determination [to receive the death penalty], but instead are designed to narrow the jury's discretion in

making the ultimate decision whether to impose a death sentence." *Id.* at 80.

As the CCA correctly stated, the Fifth Amendment right to an indictment in felony cases has yet to be extended to the states through the Fourteenth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). The Fifth Circuit has additionally noted that "in *Robinson*, [the court] addressed only the requirement of a grand jury indictment in a federal prosecution." *Kerr v. Thaler*, 384 F. App'x 400, 403 (5th Cir.2010). Neither the Fifth Circuit nor the Supreme Court has extended the requirement to the states. *Id.*

Further, in Texas, the eligibility determination regarding the death penalty is made at the guilt phase of trial according to the elements that were alleged in the indictment. *See Lowenfield v. Phelps*, 484 U.S. 231, 245-46, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Texas Penal Code Section 19.03 sets forth the elements to establish capital murder, which are the aggravating factors that could render an individual eligible for the death penalty. The special issues addressed during the punishment phase of trial do not apply to the eligibility determination, but rather apply to narrow the jury's discretion in making the ultimate decision whether to impose a death sentence. *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) ("By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury

will have adequate guidance to enable it to perform its sentencing function."). As such, special issues are not an element of the offense that must be included in the indictment. *Granados v. Quarterman*, 455 F.3d 529, 536-37 (5th Cir.2006); *Rowell v. Dretke*, 398 F.3d 370 (5th Cir.2005); *Anderson v. Quarterman*, 204 F. App'x 402, 409 (5th Cir.2006). For these reasons, the Court finds that the CCA's determination was not an unreasonable application of Supreme Court precedent and this claim is denied on the merits. *See* 28 U.S.C. § 2254(d).

IX. CONSTITUTIONALITY OF TEXAS'S "10-12"[9] RULE (CLAIM 10)

Davila next argues that the trial court erred by overruling his objection to the constitutionality of Texas's "10-12 Rule." Am. Pet. 130, ECF No. 17. Specifically, Davila maintains that Texas's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments. *Id.* In response, Respondent contends that Davila fails to demonstrate that the CCA's determination resulted in an unreasonable application of clearly established Supreme Court precedent. Resp. 81, ECF No. 29.

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[9] The "10-12" Rule, as used in the parties' briefing and throughout this Order, refers to Article 37.071, § 2(f)(2) of the Texas Code of Criminal Procedure.

A. Applicable Law

Article 37.071 of the Texas Code of Criminal Procedure provides, in relevant part:

> (e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:
>
> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.
>
> . . .
>
> (f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:
>
> (1) shall answer the issue "yes" or "no";
>
> (2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree

Tex.Code Crim. P. art. 37.071 § 2(e)-(f).

B. Risk of Arbitrariness – Eighth & Fourteenth Amendments

Davila first argues that "[t]he 10-12 Rule affirmatively creates confusion in the minds of the jurors" because they "are first told that the jury as a whole 'shall' answer 'yes' or 'no' to each issue presented" then they "are subsequently told that ten or more jurors must be in agreement to give one set of answers and that they must be unanimous in order to give another." Am. Pet. 132, ECF No. 17. The statute provides, however, that the jury's inability to answer a special issue shall result in a life sentence. Tex.Code Crim. P. art. 37.071, § 2(g). And, section 2(a)(1) prohibits the court or counsel from informing the jury of the effect of a failure to agree on the special issues submitted. Tex.Code Crim. P. art. 37.071, § 2(a)(1). As a result, jurors are not informed that a single juror could prevent the imposition of the death penalty, which is in violation of his Eighth and Fourteenth Amendment rights. *Id.*

The Supreme Court has rejected this argument in *Jones v. United States.* 527 U.S. 373, 381-83, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) ("In light of the legitimate reasons for not instructing the jury as to the consequences of deadlock, and in light of congressional silence, we will not exercise our supervisory powers to require that an instruction of the sort petitioner sought be given in every case."). In *Jones*, the Court held that a jury need not be told what happens procedurally when a verdict cannot be reached. *Id.* Although the jury cannot be "affirmatively misled regarding its role in the sentencing process," a court is not required

to instruct the jury "as to the consequences of a breakdown in the deliberative process." *Id.* at 381-82. The instruction in Davila's case accurately recited the governing law. This sub-claim is denied on the merits. 28 U.S.C. § 2254(d).

C. Right to Individualized Sentencing-Eighth Amendment

Davila next contends that he was denied his Eighth Amendment right to individualized sentencing because the 10-12 Rule misleads jurors regarding their individual ability to give effect to their belief on mitigating circumstances. Am. Pet. 140-44, ECF No. 17. Specifically, "[b]y instructing the jury that ten jurors are required in order to give a 'yes' answer, the Texas statutes . . . prevent individual jurors from having a meaningful opportunity to consider mitigating factors." *Id.* at 144. In support, Davila cites to *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1998). In *Mills*, the Supreme Court determined that the jury instructions violated the Eighth Amendment because they may have prevented the jury from considering mitigating evidence unless the jurors unanimously agreed that a particular circumstance was supported by the evidence. *Id.* at 384. The Supreme Court has since explained that "*Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death." *McKoy v. North Carolina*, 494 U.S. 433, 422-43, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). Further, the Fifth Circuit has

determined that *Mills* is not applicable to the capital sentencing scheme in Texas. *See Druery v. Thaler*, 647 F.3d 535, 542-43 (5th Cir.2011) (noting that the Fifth Circuit has refused to invalidate the Texas sentencing scheme based on the *Mills* decision); *Miller v. Johnson*, 200 F.3d 274, 288 (5th Cir.2000); *Jacobs v. Scott*, 31 F.3d 1319, 1329 (5th Cir.1994) ("Under the Texas system, all jurors can take into account any mitigating circumstance. One juror cannot preclude the entire jury from considering a mitigating circumstance. Thus, *Mills* is inapplicable."). As a result, the Court denies this sub-claim on the merits. *See* 28 U.S.C. § 2254(d).

D. Right to Fair and Impartial Jury – Sixth Amendment

Finally, Davila argues that the 10-12 Rule "forces the jury to wonder what would happen were they . . . unable to answer the special issues, possibly leads them to believe that an unacceptable third alternative other than life and death would follow, and then leaves them to draw upon their own preconceived notions in coming to a verdict." Am. Pet. 146, ECF No. 17. Davila appears to extend the arguments advanced with respect to the Eighth Amendment to the instant argument. Davila fails to offer any new case law or arguments apart from those that he previously offered. The Court previously found that Davila's arguments under the Eighth Amendment were without merit. *See* Part IX.C. Consequently, Davila has failed to carry his burden under 28 U.S.C. § 2254(d), and Claim Ten is denied.

X. JURY INSTRUCTION – BURDEN OF PROOF ON MITIGATION SPECIAL ISSUE (CLAIM 11)

Davila argues that the trial court erred by denying his motion seeking to instruct the jury regarding the burden of proof on the mitigation special issue. Am. Pet. 148, ECF No. 17. Davila contends that the court should have instructed the jury that the burden regarding the mitigation issue lies with the State. *Id.* In response, Respondent maintains that there is no constitutional requirement for the State to prove an absence of mitigating evidence. Resp. 85, ECF No. 29.

A. Applicable Law

Under Texas law, once a defendant is found guilty of capital murder, the jury is tasked with answering two special issues to determine whether the defendant will receive the death penalty. Specifically, the jury must answer the special issues unanimously to impose a death sentence. Tex.Code Crim. Proc. Ann. art. 37.071 § 2. The first of the two special issues requires the jury to assess the future dangerousness of the defendant. *Id.* § 2(b). The State must prove this issue beyond a reasonable doubt. *Id.* § 2(c). After answering the first special issue, the jury then addresses the issue of mitigation. *Id.* § 2(e)(1). The mitigation issue assigns no burden of proof. *Id.*

B. Analysis

Davila states that "[b]ecause [a negative answer to] the mitigation issue in the Code of Criminal Procedure Art. 37.071 § 2 (Special Issue Number Two) increases the maximum penalty for the crime of capital murder, Texas' statutory scheme is unconstitutional for not requiring this issue to be submitted, proved, and found by the jury beyond a reasonable doubt." Am. Pet. 149, ECF No. 17. The Fifth Circuit has addressed this issue and determined that "no Supreme Court or Circuit precedent requires mitigation to be proved beyond a reasonable doubt." *Kerr*, 384 F. App'x at 403; *Rowell*, 398 F.3d at 378. As a result, this claim is denied on the merits.

XI. REQUEST FOR HEARING

This Court previously denied without prejudice Davila's request for a hearing on Claims 2, 3 and 4 and stated that it would *sua sponte* consider whether a hearing is appropriate after a more thorough evaluation under the AEDPA. This Court has discretion to grant an evidentiary hearing if one is not barred under § 2254(e)(2). *Landrigan*, 550 U.S. at 473. In exercising that discretion, the Court considers whether a hearing could enable Davila to prove the petition's factual allegations which, if true, would entitle him to relief. *Landrigan*, 550 U.S. at 474. The Court also must consider the deferential standards in § 2254(d), which limit the Court's ability to grant habeas relief. *Id.* In practical effect, if the state-court record precludes habeas relief

under the limitations of § 2254(d), a district court is not required to hold an evidentiary hearing. *Id.*; *Pinholster*, 131 S.Ct. at 1399.

Claim 2 was adjudicated on the merits and the state court's ruling was determined to be reasonable. 28 U.S.C. § 2254(d). Claim 3 is procedurally barred, with no available avenue excusing the default, and Davila fails to allege any facts that, if true, would entitle him to relief on that claim. Davila also failed to demonstrate that the ineffective assistance of state habeas counsel alleged in Claim 4 is relevant to the procedural or substantive viability of Claims 2 and 3. Habeas relief is therefore precluded by § 2254(d) and § 2254(b), rendering a hearing on these claims inappropriate. *See Pinholster*, 131 S.Ct. at 1400-01; *Reed*, 739 F.3d at 778 n. 16.

XII. CONCLUSION

Based on the foregoing, the Court **DENIES** Davila's petition for a writ of habeas corpus. In accordance with Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), and after considering the record in this case, the Court denies Davila a certificate of appealability because he has failed to make a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000); 28 U.S.C. § 2253(c)(2). If Davila files a notice of appeal, he

may proceed in forma pauperis on appeal. 18 U.S.C. § 3006A(7).

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ERICK DANIEL DAVILA, **Petitioner,**	§	
v.	§	**Civil Action No. 4:13-cv-506-O (death-penalty case)**
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
Respondent.	§	

FINAL JUDGMENT

(Filed Apr. 21, 2015)

By separate order of this same date, the Court has denied Erick Daniel Davila's Amended Petition for Writ of Habeas Corpus. It is therefore **ORDERED, ADJUDGED, and DECREED** that the claims in the petition are **dismissed with prejudice**. All relief not expressly granted is **DENIED**. This is a final judgment.

SO ORDERED on this **21st day** of **April, 2015**.

2016 WL 3171870
Only the Westlaw citation
is currently available.
This case was not selected for publication in West's
Federal Reporter. See Fed. Rule of Appellate
Procedure 32.1 generally governing citation of judicial
decisions issued on or after Jan. 1, 2007. See also
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5
United States Court of Appeals,
Fifth Circuit.

Erick Daniel Davila,
Petitioner-Appellant
v.
Lorie Davis, Director, Texas
Department of Criminal Justice,
Correctional Institutions Division,
Respondent-Appellee.

No. 15-70013
|
FILED May 26, 2016
|
REVISED May 31, 2016

Appeal from the United States District Court for the Northern District of Texas, USDC No. 4:13-CV-506

Attorneys and Law Firms

Seth Kretzer, Law Offices of Seth Kretzer, Jonathan David Landers, Houston, TX, for Petitioner-Appellant.

Katherine D. Hayes, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, Austin, TX, for Respondent-Appellee.

Before DENNIS, SOUTHWICK, and HAYNES, Circuit Judges.

Opinion

PER CURIAM:*

Erick Daniel Davila was convicted of capital murder and sentenced to death. After pursuing relief in state court, he brought a Section 2254 action. The district court denied relief. He now seeks a certificate of appealability ("COA") from this court. We deny him a COA.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2009, a Texas jury found Davila guilty of capital murder. Davila had opened fire with a semi-automatic assault rifle on a birthday party at a home in Fort Worth, Texas, killing Annette Stevenson and her five-year-old granddaughter, Queshawn Stevenson. The birthday party was for another of Annette's granddaughters. All the guests were children or adult women, except for Jerry Stevenson, Queshawn's father.

Around 8:00 p.m., many guests were on the porch when a black Mazda passed by the house slowly, driven by a man with a gun. A few minutes later, Cashmonae

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Stevenson, an 11-year-old at the party, saw a man run in front of the house across the street and begin shooting at the guests on the porch. Panic ensued as the guests tried to get inside the house. Multiple children, including Cashmonae, and adult guests were shot and injured. Annette and Queshawn were the only ones to die from their injuries.

A police investigation led to the arrest of Davila, who gave four written statements over the course of seven hours in custody after his arrest. Davila was a member of the Bloods gang. Davila's third statement included admissions that he and his friend had been driving around in his girlfriend's black Mazda and decided to have a "shoot em up." He said that he was trying to shoot "the guys on the porch and . . . trying to get the fat dude." He stated he did not know the name of the "fat dude," but recognized him.[1] As for the "guys on the porch," Davila appeared to have mistaken some adult women at the party for men because the only male at the party was Jerry. This confession, along with other evidence, was presented at Davila's trial and led to his conviction.

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[1] Jerry Stevenson testified that neither he nor anyone who lived at Annette Stevenson's house was associated with the rival Crips gang, although he had friends who were Crips. A few weeks before this shooting, Stevenson had intervened in an argument that occurred in front of Annette's house between some of his family members and members of the Bloods gang. A security guard who witnessed the argument testified that Davila was one of the men with whom Stevenson was arguing.

At the punishment phase, the State introduced aggravating evidence: Davila had attempted to escape from jail and seriously injured a detention officer in the process; he had committed an aggravated robbery and an additional murder only two days before the birthday party shooting; he also had been convicted for burglary of a habitation in 2006.

For the mitigation case, the defense offered testimony from Davila's father, sister, mother, maternal aunts, and a psychologist, Dr. Emily Fallis. In summary, they testified that Davila had been raised solely by a teenage mother, with his alcoholic father having been incarcerated for murder since he was very young. Davila's mother told him that he was conceived when his father sexually assaulted her. She was neglectful, abusive, and hateful towards Davila and his sister, and even made them leave the house as teenagers. Davila's sister testified about physical fights she had with their mother. After deliberation, the jury returned a sentence of death.

The Texas Court of Criminal Appeals affirmed Davila's conviction on direct appeal, and the United States Supreme Court denied a writ of certiorari. Davila then pursued state habeas relief. He petitioned the convicting court for a writ of habeas corpus, which was denied. He then sought a writ of habeas corpus from the Court of Criminal Appeals, which adopted the convicting court's findings and conclusions and denied relief. He again petitioned the Supreme Court for a writ of certiorari, which was denied.

Davila then sought federal habeas corpus relief under 28 U.S.C. § 2254. He presented seven constitutional claims:

1) The evidence at trial was insufficient to support his conviction;

2) He received ineffective assistance of trial counsel, appellate counsel, and state habeas counsel;

3) His written confession to this offense was erroneously admitted;

4) His written confession to a separate murder was erroneously admitted;

5) The trial court erroneously denied his motion to preclude the death penalty and declare Article 37.071 of the Texas Code of Criminal Procedure unconstitutional;

6) The trial court erroneously overruled his objection to Texas's "10-12 Rule"; and

7) The trial court erroneously instructed the jury about the burden of proof on mitigation.

In addition to his application for federal habeas relief, he sought an evidentiary hearing and a stay and abeyance to allow him to exhaust an ineffective assistance claim in state court. The district court reviewed the state court proceedings with the deference required by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), then denied habeas relief. The court also denied the motion for an evidentiary hearing and a stay and abeyance. The court did not certify any

issue for appeal. Davila now seeks a COA from our court to allow him to proceed on appeal. *See* 28 § U.S.C. 2253(c)(1)(A).

DISCUSSION

We grant a COA only upon "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). When the district court denies an applicant's constitutional claims on the merits, a COA will only issue if the applicant shows "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). When the district court denies an applicant's claims on procedural grounds, a COA will only issue if the applicant shows that reasonable jurists would debate whether the district court was correct in its procedural ruling and whether the petition states a valid claim on the merits. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).

AEDPA requires federal district courts to give deference to state court decisions. *See Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005). A federal court must not grant habeas relief regarding any claim adjudicated on the merits in state court proceedings unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable

application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . or . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1), (2).

A state court's adjudication is "contrary to" Supreme Court precedent if: (1) the state court reaches the opposite conclusion from the Supreme Court on a question of law; or (2) the state court arrives at the opposite result of Supreme Court precedent in a case involving materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court's decision is "an unreasonable application" of clearly established federal law if it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Perez v. Cain*, 529 F.3d 588, 594 (5th Cir. 2008). Even if we find that a state court incorrectly applied clearly established federal law, we can only correct the state court if the incorrect application was also objectively unreasonable. *Id.*

A determination of facts by a state court is presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "This presumption of correctness attaches not only to explicit findings of fact, but also to 'unarticulated findings which are necessary to the state court's conclusion of mixed law and fact.'" *Pippin*, 434 F.3d at 788 (quoting *Pondexter v. Dretke*, 346 F.3d 142, 148 (5th Cir. 2003)).

We must conduct a "threshold inquiry into the underlying merit" of Davila's habeas claims to determine whether a COA should issue. *Miller-El*, 537 U.S. at 327, 123 S.Ct. 1029. This inquiry "does not require full consideration of the factual or legal bases" of the claims. *Pippin*, 434 F.3d at 787.

I. Sufficiency of the Evidence Claim

Davila asserts that there was insufficient evidence to support his conviction for capital murder because capital murder in Texas requires specific intent to kill more than one person. He claims the evidence showed he only intended to kill one person: Jerry Stevenson.

The district court denied this claim because Davila's written statement evidenced intent to kill more than one person. Davila's statement included the following: "we were going to have a shoot em up . . . The fat dude was in the middle of the street. The other 3 were on the porch. . . . I was trying to get the guys on the porch and I was trying to get the fat dude." The district court decided that the Texas Court of Criminal Appeals did not unreasonably apply clearly established federal law to assess sufficiency of the evidence, as set out in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Davila argues that a COA should issue on whether his legal sufficiency claim should be analyzed under Section 2254(d)(1) or (d)(2). Davila asserts that the district court did not address his claim that the Texas

Court of Criminal Appeals made unreasonable determinations of the facts under Section 2254(d)(2), but instead just analyzed his claim under Section 2254(d)(1). An applicant establishes legal error in the state court proceedings under Section 2254(d)(1), but factual error under Section 2254(d)(2). *See Lewis v. Thaler*, 701 F.3d 783, 791 (5th Cir. 2012). A claim of insufficient evidence is a mixed question of law and fact, which we review under Section 2254(d)(1). *See Miller v. Johnson*, 200 F.3d 274, 281, 286-88 (5th Cir. 2000). Accordingly, we deny a COA on this sub-issue because reasonable jurists would not debate the district court's resolution in light of our precedent.

We must decide whether the Texas Court of Criminal Appeals' rejection of Davila's claim that the evidence was insufficient "was an objectively unreasonable application of the clearly established federal law" as set out in *Jackson*, 443 U.S. 307, 99 S.Ct. 2781. *See Martinez v. Johnson*, 255 F.3d 229, 244 (5th Cir. 2001). Evidence is sufficient if, viewing it in the light most favorable to the state prosecution, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. We look to state law to determine the substantive elements of the crime. *Coleman v. Johnson*, ___ U.S. ___, 132 S.Ct. 2060, 2064, 182 L.Ed.2d 978 (2012). Murdering more than one person in the same criminal transaction qualifies as capital murder in Texas. TEX. PENAL CODE § 19.03(a)(7)(A). Murder requires "intentionally or knowingly caus[ing] the death of an individual." *Id.* § 19.02(b)(1). Under

Texas law, a person is still "criminally responsible for causing a result if the only difference between what actually occurred and what he desired . . . is that . . . a different person . . . was . . . harmed." *Id.* § 6.04(b)(2).

Davila's third written statement reveals an intent to kill at least four persons. Because there was only one man at the party, Jerry Stevenson, Davila mistook some of the adult women for men. Under Texas law, Davila's intent to kill four men transferred to the killing of Annette and Queshawn Stevenson. A rational juror could look at that evidence and decide beyond a reasonable doubt that Davila intentionally or knowingly killed more than one person. Reasonable jurists would not find the district court's resolution debatable or wrong. We deny a COA on this claim.

II. Ineffective Assistance of Appellate Counsel Claim

Davila contends that he is entitled to a COA on his claim that his counsel in the direct appeal from his conviction was ineffective for failing to raise an allegedly erroneous jury instruction on appeal.

During deliberations, the jury sent this written question to the trial judge: "In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others[?]" The trial judge responded by giving the jury an instruction that for the first time tracked the Texas transferred-intent statute: "A person is nevertheless criminally responsible for causing a result if the only

difference between what actually occurred and what he desired, contemplated or risked is that: a different person was injured, harmed, or otherwise affected." This additional instruction was submitted along with another instruction repeating the definitions for "intentionally" and "knowingly." Davila's trial counsel objected to the instruction on the basis that it should not have been sent to the jury until more deliberation had occurred. Davila now claims that counsel should have argued on appeal from the conviction that the additional jury instruction incorrectly stated Texas law because he had to have specific intent to murder more than one person, but the jury charge permitted him to be convicted of capital murder even if he only intended to kill Jerry Stevenson.

Because Davila did not raise this ineffective appellate counsel claim in state habeas proceedings, the district court held it was procedurally defaulted. The district court rejected Davila's argument that *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler*, ___ U.S. ___, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), should extend to excuse ineffective assistance of appellate counsel claims that are defaulted due to state habeas counsel's ineffectiveness. We have addressed this possible extension of *Martinez* in at least one precedent, where we wrote that if the petitioner was "suggest[ing] that his ineffective-assistance-of-appellate-counsel claims also should be considered under *Martinez*, we decline to do so." *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014). We do not interpret the court's declining to

consider the issue to have been based on discretion. We must consider Section 2254 claims when they are non-defaulted, exhausted, and otherwise properly raised. Moreover, *Reed* included one citation to an opinion holding that *Martinez* made an "unambiguous holding" to the effect that "ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel." *Id.* (quoting *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013)).

In light of this controlling precedent from our court, reasonable jurists at least in this circuit would not debate the district court's conclusion that this claim of error arising from the response to the jury note was procedurally defaulted because Davila failed to exhaust it in state court proceedings. *See Blue v. Thaler*, 665 F.3d 647, 669 (5th Cir. 2011) ("Because both of Blue's arguments with respect to the burden of proof on the mitigation special issue are foreclosed by Fifth Circuit precedent, the correctness of the district court's decision to reject them is not subject to debate among jurists of reason.").

Finally, Davila challenges the district court's resolution of his motion for a stay and abeyance and motion for an evidentiary hearing. Davila sought a stay and abeyance so he could exhaust this claim in state court. A stay and abeyance is warranted when the petitioner shows there was good cause for the failure to exhaust the claim in state court, the claim is not plainly meritless, and there is no indication the failure was for delay. *See Williams v. Thaler*, 602 F.3d 291, 309 (5th Cir.

2010). We review the denial of a stay and abeyance for abuse of discretion. *See Rhines v. Weber*, 544 U.S. 269, 277-78, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). The district court did not abuse its discretion because this claim is meritless, as discussed above, and there was no showing of good cause. Additionally, the district court did not abuse its discretion in denying Davila's request for an evidentiary hearing under Section 2254(e). *See Clark v. Johnson*, 202 F.3d 760, 765-66 (5th Cir. 2000). Here, the record itself precludes habeas relief and thus, a hearing would not enable Davila to prove factual allegations in his petition that, if true, would entitle him to relief. *See Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007). We deny a COA on this claim.

III. Ineffective Assistance of Trial Counsel Claim

Davila claims his trial counsel was ineffective in failing to make a proper investigation of his background or present a mitigation case to the jury at the punishment phase under *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). This claim was presented to the Texas Court of Criminal Appeals and rejected. The district court reviewed the state court's decision[2] and held the state court's resolution of

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[2] To the extent that Davila argues the district court was not limited to the state habeas court's record under *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011), because he claims his state habeas counsel was ineffective, we reject that claim. *See Escamilla v. Stephens*, 749 F.3d 380, 394-95 (5th Cir. 2014); *Ross v. Thaler*, 511 Fed.Appx. 293, 305 (5th Cir. 2013).

the claim was not contrary to, or an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, and subsequent caselaw. Under *Strickland*, an ineffective assistance of trial counsel claim requires deficient performance and prejudice. *Id.* at 690-92, 104 S.Ct. 2052. Deficient performance is conduct that falls below an objective standard of reasonableness. *Id.* at 688, 104 S.Ct. 2052. Counsel must conduct a reasonable investigation into a defendant's background in order to make reasonable, strategic decisions about how to present, or whether to present, the mitigation case. *See Wiggins*, 539 U.S. at 521-23, 123 S.Ct. 2527. To show prejudice, Davila must show "a reasonable probability that . . . the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. To determine prejudice in the context of mitigation evidence, the reviewing court "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. Our limited review is whether reasonable jurists would debate the district court's decision that the Texas court did not unreasonably apply *Strickland* and *Wiggins*.

Davila argues that his trial attorneys were deficient because they failed to hire a mitigation specialist. Davila relies on the ABA Guidelines to claim that the failure to hire a mitigation specialist was deficient performance. The ABA Guidelines are only guides, not

requirements, to determine whether counsel's performance was reasonable. *See Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Here, trial counsel worked together with a clinical psychologist, Dr. Emily Fallis, to investigate and evaluate mitigation evidence. Trial counsel conducted the factual investigation into Davila's background and childhood themselves, with the help of a fact investigator, because they wanted to build relationships with potential witnesses. Counsel interviewed at least 12 family members in addition to friends and employers. Counsel obtained Davila's school records and spoke to former teachers. After conducting initial interviews, counsel would send certain persons to be interviewed by Fallis. The interviews Fallis conducted allowed her to present her testimony more effectively about the impact of Davila's upbringing and background. Counsel also had Davila examined by another psychologist, neurologist, and hired another doctor with expertise in gang activity. Trial counsel made a reasonable decision to maintain responsibility for the factual investigation and to seek the assistance of an expert, Fallis, in evaluating and presenting the mitigation evidence.

Davila also argues that counsel was deficient by failing to uncover additional mitigation evidence from four extended family members identified by mitigation specialist, Toni Knox, who testified at the state habeas proceeding regarding trial counsel's deficient performance. As the district court noted, two of those individuals were contacted at the time of trial but refused to testify or were otherwise uncooperative. We agree with

the district court that counsel was not deficient for leaving the uncooperative family members uncalled. Additionally, as for the other two family members, counsel was not necessarily unreasonable for failing to interview them. "Questioning a few more family members . . . can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there." *Rompilla v. Beard*, 545 U.S. 374, 389, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). Based on the investigation that counsel conducted, it was reasonable to doubt that interviews with these two extended family members would result in different, new information beyond what they already had discovered.

Furthermore, regarding any possible deficient performance in failing to interview the other two witnesses whom Knox identified, the district court held that Davila could not show prejudice. The court concluded that the mitigation evidence Knox presented from these witnesses was of the same kind trial counsel had presented: Davila's mother was neglectful and abusive towards her children. Davila claims that the uncovered mitigation evidence would have shown more details of the type of physical abuse Davila and his sister endured. As the district court noted, such an argument "comes down to a matter of degrees" and is "even less susceptible to judicial second-guessing." *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999). The additional mitigation evidence presented by Knox "was largely cumulative and differed from the evidence presented at trial only in detail, not in mitigation

thrust." *See Villegas v. Quarterman*, 274 Fed.Appx. 378, 384 (5th Cir. 2008).

Additionally, when compared to the strong aggravating evidence, any incremental increase in mitigation evidence would not create "a reasonable probability that . . . the result of the proceeding would have been different." *See Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. Not only were the facts of Davila's shooting of Annette and Queshawn Stevenson aggravating, but he also had a serious criminal history and had admitted to murdering another person days before the birthday party shooting. Furthermore, he attacked and seriously injured a guard while trying to escape jail prior to his trial. Finally, as the district court noted, evidence demonstrating abuse to Davila and his sister could undermine any possible mitigating effect, because his sister made different choices than Davila despite growing up in the same environment. *See Guevara v. Stephens*, 577 Fed.Appx. 364, 369 (5th Cir. 2014).

Reasonable jurists would not debate the district court's conclusion that Davila's attorneys conducted a reasonable investigation, made reasonable strategic choices, and that any other available mitigation evidence could not outweigh the aggravating evidence. We deny a COA on this claim.

IV. Suppression Issues

Davila presented four claims to the district court involving suppression of statements he made. He has

grouped them together in his application for a COA. They seek suppression of Davila's oral and written statements under the Fourth, Fifth, and Sixth Amendments.

First, we address his Fourth Amendment claims. The district court held that *Stone v. Powell*, 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), prevented review of Davila's Fourth Amendment claims because Davila had an opportunity to fully and fairly litigate these in state court.

Davila argues that *Stone* has never been applied by the Supreme Court in a capital case. The district court noted that panels of our court have applied *Stone* in capital cases. *See, e.g.*, *ShisInday v. Quarterman*, 511 F.3d 514, 524-25 (5th Cir. 2007). The Supreme Court has never indicated that *Stone* does not apply in capital cases. Davila argues that AEDPA should have abrogated the rule in *Stone*. Our circuit has continued to apply *Stone* after AEDPA to capital cases. *See id.*; *see also Busby v. Dretke*, 359 F.3d 708, 722-23 (5th Cir. 2004); *Balentine v. Quarterman*, 324 Fed.Appx. 304, 306 (5th Cir. 2009). In light of our binding precedent, reasonable jurists would not debate the district court's determination that *Stone* barred Davila's Fourth Amendment claims if he had a full and fair opportunity to litigate them in state court.

The district court noted that Davila had moved to suppress all his oral and written statements. Prior to trial, the state court held a hearing and heard evidence on Davila's Fourth Amendment claims. The state court

denied Davila's motion to suppress. Davila again raised the validity of his arrest warrant during the state trial, and the trial court denied his motion again on a different basis. On direct appeal, the Texas Court of Criminal Appeals affirmed the trial court's rulings. Jurists of reason would not debate that Davila was given a full and fair opportunity to litigate his Fourth Amendment claims. *See Janecka v. Cockrell*, 301 F.3d 316, 320-21 (5th Cir. 2002).

For his Fifth and Sixth Amendment claims, Davila argues that his written statements were not voluntary because he was in "custodial interrogation for seven hours" without anything to eat or drink and without using the restroom. This claim was presented during state habeas proceedings, and the state court resolution of it must be given AEDPA deference. Whether a confession is voluntary is ultimately a legal question, which sometimes involves subsidiary mixed issues of law and fact, and accordingly, we review it under Section 2254(d)(1). *See Barnes v. Johnson*, 160 F.3d 218, 222 (5th Cir. 1998). Any purely factual sub-questions are presumed correct, unless shown to be unreasonable determinations of fact by clear and convincing evidence. *See id.*; 28 U.S.C. § 2254(d)(2), (e)(1). To determine voluntariness, we consider the "totality of the circumstances." *Rogers v. Quarterman*, 555 F.3d 483, 491 (5th Cir. 2009). "A statement is involuntary if there existed official, coercive conduct that made it unlikely the statement was a product of the individual's free choice." *Id.*

The district court determined that the state court's evaluation of the voluntariness of Davila's confession was not an unreasonable application of, or contrary to, clearly established Supreme Court precedent. The state court noted that Davila never requested food, a drink, or a restroom break while he was in custody. Davila points to no clearly established federal law that the state court unreasonably applied in deciding that these facts did not show coercive or improper activity. The district court's resolution would not be debated among jurists of reason. We deny the COA on the suppression claims.

V. Claims Regarding the Texas Death Penalty Scheme

a. Violation of the Fifth Amendment Grand Jury Guarantee

Davila claims that the Texas death penalty scheme, Article 37.071 of the Texas Code of Criminal Procedure, violates the Fifth Amendment because the special issues considered at the punishment phase are not presented to the grand jury that returns the indictment. Both the Texas Court of Criminal Appeals and the district court rejected this claim because the Fifth Amendment's guarantee to a grand jury indictment has not been extended to the states through the Fourteenth Amendment. *See Albright v. Oliver*, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). Reasonable jurists would not debate the district court's resolution in light of *Albright*. *See Kerr v. Thaler*, 384 Fed.Appx. 400, 402-03 (5th Cir. 2010). We deny the COA.

b. Violation of the Eighth and Fourteenth Amendments

Davila argues that Article 37.071 violates the Eighth and Fourteenth Amendments. Under Texas's death penalty statute, capital jurors first consider a future dangerousness special issue set out in the statute. TEX. CODE CRIM. PROC. art. 37.071 § 2(b)(1). The jury is instructed that it cannot answer "yes" to the future dangerousness issue unless it agrees unanimously, and cannot answer "no" unless ten or more jurors agree. *Id.* § 2(d)(2). If the jury answers "yes" to the future dangerousness special issue, the jury is to answer a mitigation special issue that also is in the statute. *Id.* § 2(e)(1). For that special issue, the jurors are instructed that they cannot answer "no" unless they all agree and cannot answer "yes" unless ten or more jurors agree. *Id.* § 2(f)(2). This system is called the "10-12 Rule." *Alexander v. Johnson*, 211 F.3d 895, 897 (5th Cir. 2000). The judge is to sentence the defendant to death if the jury answers the future dangerousness issue "yes" and the mitigation issue "no." TEX. CODE CRIM. PROC. art. 37.071 § 2(g). If the jury answers "no" to the future dangerousness issue, "yes" to the mitigation issue, or "is unable to answer" either issue, then a life sentence results. *Id.*; *see also Blue*, 665 F.3d at 669 (explaining TEX. CODE CRIM. PROC. art. § 37.071). Neither the court nor the parties may inform jurors that their failure to agree on an answer will result in a life sentence. *See* TEX. CODE CRIM. PROC. art. 37.071 § 2(a)(1), (g).

First, Davila claims the 10-12 Rule misleads the jury on its role in the sentencing process because the jury is not told "a single juror is statutorily permitted to cause a sentence of life" by preventing unanimous agreement to the future dangerousness special issue. He argues the Texas death penalty statute, therefore, runs afoul of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). We have already rejected this argument. *See Druery v. Thaler*, 647 F.3d 535, 544 (5th Cir. 2011).

Second, he claims that the 10-12 Rule violates his right to individualized sentencing under *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) and *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). Davila asserts that a reasonable juror could believe that his vote on the sentencing special issues is meaningless unless enough jurors agree with him because there is no instruction on the effect of a lack of unanimity. We have also rejected this claim. *See Reed*, 739 F.3d at 779.

Davila argues that the post-1991 Texas death penalty scheme, which now includes a true mitigation special issue under *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), has not been squarely addressed by our court. Yet, we have considered the 10-12 Rule since the 1991 changes to Article 37.071 and have held that the mitigation special issue does not violate *Mills* or *McKoy*. *See Allen v. Stephens*, 805 F.3d 617, 624, 631-33 (5th Cir. 2015). The Texas death penalty scheme does not create the possibility that reasonable jurors would think they all had to

agree on particular mitigating evidence like the statute in *Mills* did; instead, each juror can independently consider mitigating evidence. *See* 486 U.S. at 384, 108 S.Ct. 1860; *see also Druery*, 647 F.3d at 543 & n.5. We have also held that this argument is barred by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *See Hughes v. Dretke*, 412 F.3d 582, 594 (5th Cir. 2005). Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

c. Violation of the Sixth Amendment Right to Proof Beyond a Reasonable Doubt

Finally, Davila argues that Article 37.071 is unconstitutional under the Sixth Amendment because it does not place the burden on the State to prove a lack of mitigating evidence beyond a reasonable doubt under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). This claim was rejected by the Texas Court of Criminal Appeals. The district court rejected relief on this claim based on our precedent. *See Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005).

Davila, in a letter directing us to recent relevant authority, cites to the decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). There, the Supreme Court held that Florida's capital sentencing scheme violated *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556. Under the Florida scheme, a jury makes an advisory verdict while the judge makes the

ultimate factual determinations necessary to sentence a defendant to death. *Hurst*, 136 S.Ct. at 621-22. The Court held that procedure was invalid because it "does not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. Davila recognizes that Texas does require jurors to make all factual determinations necessary for a death sentence. His argument is that the scheme is unconstitutional because jurors do not have to find the absence of mitigating circumstances beyond a reasonable doubt. Our precedent precludes this claim. *Rowell*, 398 F.3d at 378. Reasonable jurists would not debate the district court's resolution, even after *Hurst*. *See Avila v. Quarterman*, 560 F.3d 299, 315 (5th Cir. 2009).

We DENY the COA as to all claims. All pending motions are denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70013

ERICK DANIEL DAVILA,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

---

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 28, 2016)

(Opinion 5/26/16, 5 Cir., ___, ___ F.3d ___)

Before DENNIS, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on

Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Leslie H. Southwick
UNITED STATES CIRCUIT JUDGE

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

January 13, 2017

Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: Erick Daniel Davila
v. Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division
No. 16-6219
(Your No. 15-70013)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.

Sincerely,

/s/ Scott S. Harris
Scott S. Harris, Clerk

RECORD AND 1 BRIEFS.

Supreme Court, U.S.
FILED
FEB 27 2017
OFFICE OF THE CLERK

No. 16-6219

In The Supreme Court of the United States

ERICK DANIEL DAVILA,

Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTION PRESENTED

Whether the rule established in *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012) and *Trevino* v. *Thaler*, 133 S. Ct. 1911 (2013) – ineffective assistance of counsel in an initial-review collateral proceeding can provide cause to overcome the procedural default of a substantial claim of ineffective assistance of trial counsel – also applies to the procedural default of a substantial claim of ineffective assistance of appellate counsel.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to this proceeding.

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OPINIONS AND ORDERS BELOW

The order of the court of appeals denying rehearing *en banc* is unreported. The opinion of the court of appeals (Pet. App. A) is unreported but available at 2016 WL 3171870. The opinion of the district court (Pet. App. B) is unreported but available at 2015 WL 1808689.

The opinion of the Texas Court of Criminal Appeals in petitioner's state habeas proceeding is unreported but available at 2013 WL 1655549. The opinion of the trial court (Pet. App. C) is unreported.

The opinion of the Texas Court of Criminal Appeals in petitioner's direct appeal (Pet. App. D) is unreported but available at 2011 WL 303265.

STATEMENT OF JURISDICTION

The order of the court of appeals denying rehearing *en banc* was entered on June 28, 2016. The petition for a writ of certiorari was filed on September 22, 2016, and was granted on January 13, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States of America provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

The Fourteenth Amendment to the Constitution of the United States of America provides:

> No state shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2254 of Title 28 of the United States Code provides, in part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits on State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 19.03 of the Texas Penal Code, as in effect in 2008, provides, in part:

(a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and:

* * *

(7) the person murders more than one person:

(A) during the same criminal transaction; or

* * *

(b) An offense under this section is a capital felony.

STATEMENT OF THE CASE

A. Davila's Trial and Conviction

In February 2009, Erick Daniel Davila stood trial for capital murder for the deaths of Annette Stevenson and her granddaughter, who were killed while attending a birthday party hosted by Ms. Stevenson. Davila's trial counsel offered two defenses: (1) mistaken identity; and (2) lack of intent to commit capital murder. 14 RR 14-17.

The identity defense was the weaker of Davila's defenses: multiple witnesses identified Davila as the shooter, and Davila admitted his responsibility for the shooting in three separate statements to police.

Davila's stronger defense concerned his lack of intent to kill more than one person. The State charged

Davila with capital murder for intentionally or knowingly "causing the death of more than one person during the same criminal transaction." R.574 (Indictment); Tex. Penal Code § 19.03(a)(7)(A) (2008). To be guilty of this offense, a defendant must have the specific intent to commit two murders. Although intent can be transferred (i.e., the defendant can be convicted for murdering two people who were not the defendant's intended two victims), it is not enough to impose the death penalty that a defendant intended to murder a single person and accidently killed two. *See Roberts* v. *State*, 273 S.W.3d 322, 330 (Tex. Crim. App. 2008). Davila's trial counsel argued that even if Davila had the intent to murder one person, he did not have the intent to murder two people and was therefore not guilty of capital murder.

Substantial evidence supported this argument: the State has never argued that Davila had any animus towards, much less intent to kill, Ms. Stevenson or her granddaughter. The only motive offered by the State was Davila's dispute with Jerry Stevenson, the only adult male at the house. R.5943. Jerry Stevenson, who lived at Annette Stevenson's house, associated with members of the "Polywood Crips" gang and acknowledged that the house where the shooting occurred was probably identified as a "Crip" house. R.5972. Davila was a member of the rival "Truman Street Bloods" gang. R.6228.

A witness testified that the red beam from the laser sight on Davila's rifle shined on Jerry Stevenson but not on the women or children outside. R.5638.

Davila also presented evidence of his poor vision, further supporting the conclusion that Annette Stevenson and her granddaughter were accidental victims of an attempt to murder a single individual: Jerry Stevenson. R.7163.

Such a defense would not lead to an acquittal on charges of murder or manslaughter. But if the jury believed that Davila intended to murder only Jerry Stevenson, then Davila could not be convicted of the capital murder as charged by the State.[1]

From the outset of trial, Davila's trial counsel emphasized that the most important issue would be intent; during his opening statement, defense counsel argued: "And what we're asking you to do is listen to all the evidence, because they have to prove that Erick had the specific intent to kill these two folks, intentionally or knowingly. You're going to be presented with that evidence through photographs and the medical examiner. That doesn't end the inquiry. So we ask you to look at this carefully, make your evaluation based on the body of evidence as to the critical question of specific intent."

---

[1] A defendant may be convicted of capital murder based on two separate instances of conduct that involved separate intents to kill the same person. *See Ex parte Norris*, 390 S.W.3d 338, 341 (Tex. Crim. App. 2012) (requiring that a defendant "engaged in two discrete instances of conduct that carried separate intents"). "It is certainly possible to intend more than once to kill a particular person." *Ibid.* Because there were no separate instances of conduct, this principle is not implicated in this case. And even if it were, it is not reflected in the jury charge.

This theme continued through closing, when counsel once again argued that Davila was attempting to kill only Jerry Stevenson. R.7255 ("[T]he only specific intent to kill required for capital murder was directed at Jerry Stevenson.").

The trial court initially instructed the jury that to convict Davila of capital murder, it needed to find, beyond a reasonable doubt, that Davila "did intentionally and knowingly cause the death" of both Annette Stevenson and her granddaughter. R.7238. The jury was not instructed on transferred intent.

The jury correctly recognized Davila's intent as the key issue. After deliberating for four hours, the jury sent out a note, which essentially asked whether Davila's theory of defense was legally viable:

> In a capital murder charge, are you asking us did he intentionally murder the specific victims, or are you asking us did he intend to murder a person and in the process took the lives of 2 others.

R.2619.

Over the objection of Davila's trial counsel, R.7285, the judge responded with a misleading instruction, which permitted the jury to convict Davila based only on the intent to kill Jerry Stevenson:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he

> desired, contemplated or risked is that: a different person was injured, armed, or otherwise affected.

R.1932-1933; Tex. Penal Code Ann. § 6.04. Without further clarification, this instruction permitted the jury to hold Davila criminally responsible for causing both the death of Annette Stevenson and the death of her granddaughter if he intended to kill only Jerry Stevenson. Davila could be criminally responsible for the death of Annette Stevenson because the difference between what occurred (her death) and what he desired (Jerry Stevenson's death) was that a different person was injured. Davila could also be criminally responsible for the death of Annette Stevenson's granddaughter because the difference between what occurred (her death) and what he desired (Jerry Stevenson's death) was that a different person was injured.

Unsurprisingly, after receiving the instruction that vitiated Davila's intent defense, the jury almost immediately returned a verdict convicting Davila of capital murder. R.7287 (Appendix E).

B. Direct Appellate and State Habeas Proceedings

On direct appeal, Davila received new appointed counsel, who correctly identified Davila's intent as the key issue in the appeal. Inexplicably, Davila's appellate counsel did not challenge the erroneous jury instructions but instead challenged only the sufficiency of the evidence. *See* R.10816 ("[T]he only scenario that passes

the common sense test, was that Appellant, a Truman Street Blood, had a grudge against Jerry Stevenson, a member of the Polywood Crips."). The Texas Court of Criminal Appeals found that sufficient evidence existed for the jury to infer that Davila intended to kill multiple individuals and affirmed his conviction. Pet. App. D. The State has never suggested that appellate counsel had a strategic reason for not challenging the jury instructions.

At the same time as Davila was appointed a new lawyer for his direct appeal, Davila was also appointed a separate lawyer for the state collateral review proceeding. That lawyer initially missed the filing deadline but was granted an extension by the Texas Court of Criminal Appeals. R.11242-11243. When his petition was finally filed, state habeas counsel argued that Davila received ineffective assistance from his trial counsel (for failing to develop mitigating evidence under *Wiggins* v. *Smith*, 539 U.S. 510 (2003)) but did not raise any complaint about the performance of his appellate counsel. R.11026. This omission is particularly salient since the habeas petition was filed in late August 2011, and the Court of Criminal Appeals' opinion had issued months before, in January 2011.

Davila's state habeas counsel hired a mitigation investigator, who raised several concerns about the performance of Davila's habeas counsel. In an affidavit, the mitigation investigator states that at the hearing on the *Wiggins* claim, Davila's habeas counsel was "generally unfamiliar with the contents of [her mitigation] report" and "made no effort to bring any of the

people identified in the report as potential witnesses." R.312-314. She believed that Davila's habeas counsel "had been in a car accident and had suffered a stroke or several strokes" and that his "impairment affected his ability to prepare for the hearing." *Ibid.* Davila received no relief in his state collateral review proceeding.

C. Federal Habeas Proceeding

Two new attorneys were appointed to represent Davila in his federal habeas proceeding and raised as a discreet claim that Davila was provided ineffective assistance of appellate counsel. Had his appellate counsel raised the jury charge issue on direct appeal it would have led to a new trial. Although this claim was not raised in the state habeas proceeding, Davila argued that the ineffective assistance he received from his state habeas counsel should excuse the procedural default of his claim of ineffective assistance of counsel on direct appeal. R.223-227; R.475-481.

Federal courts generally may not grant habeas relief based on "contentions of federal law which were not resolved on the merits in the state proceeding due to [the defendant's] failure to raise them there as required by state procedure." *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977). "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman* v. *Thompson*, 501 U.S. 722, 732

(1991). Nonetheless, a prisoner may receive federal habeas review by showing "cause" and "prejudice" for a state procedural waiver. *Wainwright*, 433 U.S. at 87.

Later decisions clarified the meaning of "cause." In *Coleman* v. *Thompson*, a prisoner filed an untimely notice of appeal of the denial of his state petition of writ of habeas corpus. 501 U.S. at 727. The Virginia Supreme Court dismissed the appeal as untimely. *Id.* at 727-728. Coleman thus defaulted his federal claims pursuant to an independent and adequate state procedural rule. *Id.* at 750.

In his federal habeas proceeding, Coleman argued that his attorney's error was "cause" that should excuse the procedural default. *Id.* at 752. The Court rejected this argument, concluding that because a prisoner has no constitutional right to the effective assistance of counsel in state habeas proceedings, "the petitioner bears the risk * * * for all attorney errors made in the course of the representation." *Id.* at 754.

Martinez narrowed *Coleman*, in part, holding that where claims of ineffective assistance of counsel must be raised for the first time in a state habeas proceeding, "ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding." *Martinez* v. *Ryan*, 566 U.S. 1, 9 (2012). In *Trevino* v. *Thaler*, 133 S. Ct. 1911 (2013), the Court held that the rule of *Martinez* applied in the

Texas system, in which raising claims of ineffective assistance of counsel on direct appeal is theoretically possible but practically impossible. *Id.* at 1918.

Davila thus argued that under *Martinez* and *Trevino*, the ineffective assistance of his state habeas counsel provided cause to excuse the procedural default of his claim of ineffective assistance of appellate counsel.

The district court rejected this argument, and the Fifth Circuit denied a certificate of appealability. Pet. App. B. The panel followed "controlling precedent" from the Fifth Circuit, which held that *Martinez* and *Trevino* do not extend to ineffective assistance of appellate counsel. *See* Pet. App. B (*citing Reed* v. *Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014)). The panel thus concluded that "reasonable jurists at least in this circuit would not debate the district court's conclusion that this claim of error arising from the response to the jury note was procedurally defaulted because Davila failed to exhaust it in state court proceedings." *Id.*

SUMMARY OF THE ARGUMENT

Martinez and *Trevino* should apply to excuse the procedural default of substantial claims of ineffective assistance of counsel on direct appeal. This conclusion follows syllogistically from the reasoning of *Martinez*. Like claims of ineffective assistance of trial counsel, ineffective assistance of appellate counsel claims must

be raised in the first instance during initial-review collateral proceedings. Unless *Martinez* also applies to these claims, their forfeiture at the hands of ineffective state habeas counsel will mean that even the most substantial ineffective appellate counsel claim will not ever be reviewed by any court.

For these purposes, there is no principled distinction between ineffective assistance of trial and appellate counsel. Nor has any court of appeals identified any reason that *Martinez* would not apply to ineffective assistance of appellate counsel. Instead, reading *Martinez* narrowly, most circuits have considered themselves bound to follow *Coleman* v. *Thompson*, 501 U.S. 722 (1991), without engaging with *Martinez*'s logic.

Nor will applying *Martinez* to ineffective assistance of appellate counsel overburden the federal courts. Because ineffective assistance of appellate counsel claims turn largely on analysis of the strength of legal arguments, relatively few resources will be expended in evaluating them.

Ineffective assistance of counsel in an initial-review collateral proceeding should provide cause to overcome the procedural default of a substantial claim of ineffective assistance of counsel, whether at trial or on appeal.

ARGUMENT

I. This Court's Reasoning in *Martinez* Applies Equally to Ineffective Assistance of Appellate Counsel.

In *Martinez v. Ryan*, this Court held, "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. 1, 9 (2012). *Martinez* creates an exception to *Coleman* v. *Thompson*, which held that ineffective assistance of counsel in state habeas proceedings "cannot constitute cause to excuse the default in federal habeas." 501 U.S. 722, 757 (1991).

The equitable exception established in *Martinez* rests on the Court's recognition that an "initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim" of ineffective assistance of trial counsel. 566 U.S. at 14.

This rule should excuse the procedural default claims of all substantial claims of ineffective assistance – both claims alleging ineffective assistance of trial counsel and claims alleging ineffective assistance of counsel on direct appeal.

The reasoning of *Martinez* – and much of its language – apply equally to claims of ineffective assistance of appellate counsel.

Claims of ineffective assistance of appellate counsel are inherently incapable of being presented on direct appeal. If the claim is not raised in the state habeas proceeding (and if this procedural default cannot be excused), it will never receive review: "[I]f counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." *Id.* at 10.

The district court in this case acknowledged that ineffective assistance of appellate counsel claims "are logically raised, as Davila asserts, in state habeas proceedings." ROA.540. Unless the procedural default can be excused, ineffective assistance of state habeas counsel will cause even the most substantial ineffective-assistance-of-appellate-counsel claims to be forever barred from review by any court.

Thus, as the first opportunity to assert the error, a "collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance [of appellate counsel] claim." *Id.* at 11. The state habeas court "'looks to the merits of the clai[m]' of ineffective assistance, no other court has addressed the claim, and 'defendants pursuing first-tier review . . . are generally ill equipped to represent themselves[.]'" *Ibid.* (*quoting Halbert* v. *Michigan*, 545 U.S. 605, 617 (2005) (omission and first alteration in original)).

Indeed, the need for the help of an adequate attorney to vindicate a substantial ineffective-assistance-of-appellate-counsel claim is even greater than the need

to vindicate an ineffective-assistance-of-trial-counsel claim. By definition, the effectiveness of appellate counsel will not have been raised on direct review, so a prisoner "cannot rely on a court opinion or the prior work of an attorney addressing th[e] claim." *Id.* at 11. And where pressing a claim of ineffective assistance of trial counsel may require "investigative work and an understanding of trial strategy," *id.* at 11, pressing a claim of ineffective assistance of appellate counsel would require an understanding of appellate strategy, procedure, and law.

In this case, for Davila to raise a claim of ineffective assistance of appellate counsel, it would have been necessary to identify the error in the jury instructions (based on the Texas law of jury charges and the Texas law of transferred intent), determine that the error was properly preserved in the trial court (or that no preservation was necessary), recognize the rule of "harm" applied to allegations of charge error in Texas, appreciate the relief that would have been granted if the issue had been raised on direct appeal, and conclude that appellate counsel could not have made a strategic decision not to raise the issue.

Prisoners understand appellate lawyers and the appellate process even less than they understand trial lawyers and trials. A prisoner is physically present for trial and, particularly in death penalty matters, works closely with trial counsel for an extended period of time, literally sitting at counsel's elbow through the trial. By contrast, a prisoner has much less interaction with his appellate lawyer and virtually no interaction

with the appellate process. prisoners necessarily rely on the assistance of effective habeas counsel to vindicate claims of ineffective assistance of appellate counsel.

And like the effective assistance of trial counsel, the effective assistance of appellate counsel is "a bedrock principle in our justice system." *Id.* at 12. The right to effective assistance of counsel on appeal arises from both the Fourteenth Amendment and the Sixth Amendment. The Fourteenth Amendment "guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal "adequate and effective." *Evitts* v. *Lucey*, 469 U.S. 387, 392 (1985) (*citing Griffin* v. *Illinois*, 351 U.S. 12, 20 (1956)). These safeguards include the right to counsel. *Ibid.* (*citing Douglas* v. *California*, 372 U.S. 353 (1963)). This Court's Sixth Amendment jurisprudence confirms that a right to counsel "comprehends the right to effective assistance of counsel." *Ibid.* (*citing Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)). Thus, an appeal "is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Id.* at 396.

One responsibility of effective trial counsel is "preserv[ing] claims to be considered on appeal." *Martinez*, 566 U.S. at 12. But without the effective assistance of counsel on direct appeal, the preservation of arguments by trial counsel is meaningless. *See* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 31.3 (6th ed. Supp. 2013) (noting the Court's description of the "right to counsel

* * * at critical stages of the proceedings before and at trial and on appeal, including * * * the right to effective assistance of counsel" as "'so basic to a fair trial that their infraction can never be treated as harmless error'" (*quoting Chapman* v. *California*, 386 U.S. 18, 23 (1967))).

In this case, Davila's trial counsel acted properly by objecting to the erroneous jury instructions and preserving the argument to be considered on appeal. But this preservation of error was rendered nugatory when Davila's new counsel abandoned the argument on his direct appeal.

Ultimately, *Martinez* recognized a principle that applies equally to substantial claims of ineffective assistance of trial and appellate counsel: "[A]s an equitable matter, [an] initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.* at 14. From this principle, "it follows" that ineffective assistance of counsel in the initial-review collateral proceeding can excuse procedural default of a substantial claim of ineffective assistance of appellate counsel. *Ibid.*

Secondary sources have recognized that application of *Martinez* in these circumstances follows naturally from its reasoning. *See* Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.3[b] (6th ed. Supp. 2013) ("Although *Martinez* concerned a claim of ineffective assistance of trial

counsel, * * * the Court's reasoning logically extends to other types of claims that, as a matter of state law or of factual or procedural circumstances, could not be raised before the postconviction stage.").

Under the reasoning of *Martinez*, the Court should hold that ineffective assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance on direct appeal.

II. In This Context, No Principled Distinction Exists Between Ineffective Assistance of Trial and Appellate Counsel.

There is no reason that the rule of *Martinez* and *Trevino* would apply to claims of ineffective assistance of trial counsel but not ineffective assistance of appellate counsel.

As Justice Scalia noted in his *Martinez* dissent: "[t]here is not a dime's worth of difference in principle between those cases [of ineffective assistance of trial counsel] and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised[,]" including "claims asserting ineffective assistance of appellate counsel." *Martinez*, 566 U.S. at 19 (Scalia, J., dissenting).

A. *Trevino* held that *Martinez* applies when a claim must, practically, be asserted on collateral review.

Only one distinction might be drawn between ineffective assistance of trial and appellate counsel: The very nature of ineffective-assistance-of-appellate-counsel claims requires them to be raised on collateral review. But some States "deliberately choos[e] to move trial-ineffectiveness claims outside of the direct-appeal process[.]" *Martinez*, 566 U.S. at 13. It was "within the context" of such a "procedural framework that counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default." *Ibid.* This Court confirmed that this distinction is of no moment in *Trevino* v. *Thaler*, 133 S. Ct. 1911, 1914 (2013).

The Texas procedural regime discussed in *Trevino* "permit[ted] (but [did] not require) the defendant initially to raise a claim of ineffective assistance of trial counsel on direct appeal." *Id.* at 1915. But as this Court and the Texas Court of Criminal Appeals recognized, "'the inherent nature of most ineffective assistance' of trial counsel" claims required the claims to be asserted in collateral review proceedings. *Id.* at 1918 (*quoting Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (*en banc*)).

Because the Texas system required, in practice albeit not formally, a claim of ineffective assistance of trial counsel to be raised on collateral review, the Court

held that the *Martinez* exception applied to the Texas procedural regime. *Trevino*, 133 S. Ct. at 1921.

Trevino's analysis confirms that the Court has focused on the practical opportunity to assert a claim. Even more so than the ineffective-assistance-of-trial-counsel claims discussed in *Trevino*, a defendant has no opportunity to assert a claim of ineffective assistance of appellate counsel before the initial collateral review proceeding.

The State may suggest that *Trevino* still turned on the State's choice of system for raising claims of ineffective assistance of trial counsel. *See Trevino*, 133 S. Ct. at 1918 (noting that "Texas procedure makes it" virtually impossible for these claims to be presented on direct review).

But the analysis in *Trevino* concerned both the State's system and "'the inherent nature of most ineffective assistance' of trial counsel 'claims.'" *Ibid.* (*quoting Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (*en banc*)). The State's procedural rules – such as a hypothetical motion for a new trial to develop the record on appeal – did not overcome those aspects of an ineffective assistance of trial counsel claim that require a collateral proceeding, such as the need to develop new evidence. *Ibid.* The inherent nature of all claims of ineffective counsel – both trial and appellate – requires the claim to be raised on collateral review. Indeed, an ineffective assistance of appellate counsel claim, because of its very nature, must be raised for the

first time in collateral proceedings, much like the ineffective assistance of counsel claim in *Martinez*.

More significantly, the purpose of the *Martinez* rule is not to punish states for requiring claims to be raised in collateral proceedings but to avoid injustice to the prisoner. In adopting the rule, the Court repeatedly emphasized that it was not criticizing the State. *See Martinez*, 566 U.S. at 13 ("This is not to imply the State acted with any impropriety by reserving the claim of ineffective assistance for a collateral proceeding."); *Trevino*, 133 S. Ct. at 1921 ("[W]e do not * * * seek to encourage States to tailor direct appeals so that they provide a fuller opportunity to raise ineffective-assistance-of-trial-counsel claims. That is a matter for the States to decide.").

The concern was that without effective assistance of counsel in a state initial-review collateral proceeding, "proper consideration" may not have been given to a substantial claim of ineffective assistance. *Martinez*, 566 U.S. at 14; *see also id.* at 11 (explaining that if an attorney errs in an initial-review collateral proceeding, "no court will review the prisoner's claims"). If a claim must be raised in a collateral proceeding, the consequences to the prisoner are the same whether it must be raised in the collateral proceeding as a matter of a state requirement, as in *Martinez*; a matter of the claim's inherent nature and the practical realities of the state system, as in *Trevino*; or primarily as a matter of the claim's inherent nature, as in this case. *See* Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After* Martinez, 55 WM. & MARY L. REV. 2071,

2167-2168 (2014) (explaining that the "proceduralist promise" of *Martinez* "is that every prisoner shall have a meaningful opportunity to litigate the federal constitutional challenges to his conviction": "When ineffective assistance of postconviction counsel deprived a prisoner of the opportunity for such a review, the Court overturned prior precedent and carved out an exception to a longstanding rule.").

The Court exercises discretion in establishing the rules for when a prisoner may establish cause to excuse a procedural default. *Martinez*, 566 U.S. at 13. The same consideration that led the Court to exercise that discretion to hold that ineffective assistance of counsel in an initial-review collateral proceeding can excuse the procedural default of a claim of ineffective assistance of counsel at trial – to ensure that at least "the claim will have been addressed by one court," *id.* at 10 – should likewise lead the Court to apply this rule to claims of ineffective assistance of counsel on direct appeal.

B. No court of appeals has identified any principled distinction.

None of the circuits – including the Fifth Circuit – that have refused to apply *Martinez* to ineffective appellate counsel claims have identified any principled distinction. Rather than considering *Martinez*'s reasoning, each of these circuits has read *Martinez* narrowly, considering itself still bound to follow this Court's decision in *Coleman* v. *Thompson*, 501 U.S. 722,

750 (1991).[2] The Court in *Martinez* instructed that "[t]he rule of *Coleman* governs in all but the limited circumstances recognized here." 566 U.S. at 16; *see also Trevino*, 133 S. Ct. at 1932 (Roberts, C.J., dissenting) (describing *Martinez* as using "aggressively limiting language").

With this narrow understanding of *Martinez*'s holding, the lower courts were not free to consider *Martinez*'s reasoning. *See Rodriguez de Quijas* v. *Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Because these circuits believed that *Coleman* controlled, there was no opportunity to consider whether the distinction between trial and appellate counsel was a rational one.

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[2] *See Hodges* v. *Colson*, 727 F.3d 517, 531 (6th Cir. 2013) ("The Court in *Martinez* purported to craft a narrow exception to *Coleman*."); *Reed* v. *Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014) (*citing Hodges*); *Banks* v. *Workman*, 692 F.3d 1133, 1148 (10th Cir. 2012) (concluding that *Coleman* governs claims of ineffective assistance of appellate counsel); *Dansby* v. *Norris*, 682 F.3d 711, 729 (8th Cir. 2012), *vacated on other grounds sub nom. Dansby* v. *Hobbs*, 133 S. Ct. 2767 (2013) ("[T]he narrow exception of *Martinez* is limited to claims of ineffective assistance of trial counsel and does not extend to alleged ineffectiveness of appellate counsel. The rule of *Coleman* governs these claims[.]"); *Long* v. *Butler*, 809 F.3d 299, 314-315 (7th Cir. 2015), *judgment vacated on other grounds*, 2016 WL 1621711 (7th Cir. Apr. 20, 2016) (agreeing with "[t]he majority of other circuits" and "refus[ing] to expand this narrow exception to the general prohibition against excusing procedural default via post-conviction ineffective assistance claims").

See Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After* Martinez, 55 WM. & MARY L. REV. 2071, 2156 (2014) ("The result in cases like *Hodges*, while defensible based on the plain text of the decision, is arguably at odds with the spirit of *Martinez*[.]").

The only circuit that considered whether *Martinez*'s reasoning should apply to claims of ineffective assistance of appellate counsel – the Ninth Circuit – correctly concluded that *Martinez* should apply both to ineffective assistance of trial and appellate counsel. "The fundamental principle of *Martinez* is that a criminal defendant deserves a chance to assert a Sixth Amendment claim of ineffective-assistance of counsel." *Ha Van Nguyen* v. *Curry*, 736 F.3d 1287, 1296 (9th Cir. 2013). "[*Martinez*] is not limited to Sixth Amendment claims of trial-counsel IAC. It also extends to Sixth Amendment claims of appellate-counsel IAC." *Ibid.*

Even among courts that refused to apply *Martinez* to claims of ineffective assistance of appellate counsel, no court has identified any reason for distinguishing between these claims.

C. Distinguishing between ineffective trial and appellate counsel would cause some prisoners to be worse off because of their trial counsel's effective assistance.

Failure to apply the *Martinez* exception to ineffective appellate counsel would lead to the perverse consequence that defendants with effective trial counsel

are worse off than defendants with ineffective trial counsel.

In this case, Davila's trial counsel provided effective assistance by objecting to the judge's response to the jury's question. *Cf. Martinez*, 566 U.S. at 12 ("Effective trial counsel preserves claims to be considered on appeal[.]"). The trial court erred by overruling the objection and giving the erroneous response to the jury, and Davila's appellate counsel on direct appeal erred by not raising this issue on direct appeal.

If Davila's trial counsel had committed the error – and provided ineffective assistance either by not objecting[3] or by inviting the incorrect instruction – then *Martinez* would undisputedly permit the ineffective assistance of Davila's state habeas counsel to excuse the procedural default and permit Davila to assert ineffective assistance of trial counsel in his federal habeas petition.

But if the Court were to affirm the decision below and hold that *Martinez* does not apply to ineffective assistance of appellate counsel, then Davila will have no remedy at all. He will be in a worse position than if his trial counsel had provided ineffective assistance.

Such a bizarre consequence only further confirms that no distinction should be drawn between claims of

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[3] Some Texas authority indicates that no objection was necessary to preserve this issue regarding the jury charge. *See Almanza* v. *State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (holding that a defendant may receive relief for charge error when no objection was made if the error was "fundamental").

ineffective trial and appellate counsel. Trial counsel should be encouraged to make contemporaneous objections. *See Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977) (requiring federal habeas courts to require compliance with contemporaneous-objection rules). A defendant should not be worse off because appellate counsel – rather than trial counsel – rendered the ineffective assistance.

III. The Practical Consequences of Applying *Martinez* Will Be Modest.

The practical consequences of the rule urged by petitioner do not suggest any prudential reason for its rejection. Adopting the petitioner's rule will be a modest and narrow application of *Martinez* and *Trevino*, which follows directly from the logic of those decisions.

The rule of *Martinez* and *Trevino* is cabined by two important limits: (1) the underlying claim must be substantial; and (2) ineffective assistance of counsel in an initial-review collateral proceeding would prevent any court from hearing the claim on the merits.

A. *Martinez* applies only to substantial claims of ineffective assistance of appellate counsel.

The impact of applying *Martinez* to ineffective assistance of appellate counsel will be limited by the requirement that these claims be substantial.

This Court has found ineffective assistance of appellate counsel when a defendant received no counsel at all. *See Penson* v. *Ohio*, 488 U.S. 75, 88 (1988) ("[A]t the time the Court of Appeals first considered the merits of petitioner's appeal, appellate counsel had already been granted leave to withdraw; petitioner was thus entirely without the assistance of counsel on appeal."). And the Court has remanded for a court of appeals to consider whether appellate counsel was ineffective for failing to file a merits brief at all. *See Smith* v. *Robbins*, 528 U.S. 259, 287-288 (2000).

But when an attorney has represented a defendant on appeal and presented argument, stating a substantial claim of ineffective assistance of appellate counsel will be difficult. Appellate counsel must "present the client's case in accord with counsel's professional evaluation." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). Arguments made to the trial court will inevitably be abandoned because elementary appellate strategy requires "focusing on one central issue if possible, or at most on a few key issues." *Id.* at 751-752. "Vigorous and effective advocacy" requires an appellate lawyer to exercise professional judgment in selecting issues for appeal. *Id.* at 753;[4] *see also Smith*, 528 U.S. at 288 ("[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal.").

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[4] Indeed, *Jones* confirms that the responsibility for selecting issues to be raised on appeal belongs to the attorney and not to the client. *Id.* at 753 & n.6.

"Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Smith*, 528 U.S. at 288 (*quoting Gray* v. *Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

Davila can satisfy this standard – the challenge to his jury instructions was a decisive argument at the time of his appeal, and no strategic reason justifies raising the much weaker sufficiency argument instead of appealing the instructions – but not every prisoner will be able to assert a substantial claim of ineffective assistance of appellate counsel. Cf. Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 Yale L.J. 2428, 2436 (2013) (noting that judges applying *Martinez* have found claims of ineffective assistance of trial counsel to be insubstantial because "*Strickland* * * * is a very high bar, and *Martinez* did not lower it one notch").

And federal judges can evaluate the substantiality of a claim of ineffective assistance of appellate counsel is "substantial" far more easily than they can evaluate the substantiality of a claim of ineffective assistance of trial counsel. The adequacy of the performance of appellate counsel will often turn on the reasonableness of not raising a particular issue on appeal, and prejudice will turn on whether the issue would have succeeded on appeal. When a judge determines that an omitted issue would not have succeeded on appeal or was not clearly stronger than those presented, no substantial claim of appellate counsel has been stated.

Unlike claims of ineffective assistance of trial counsel, these initial evaluations of the substantiality of a claim of ineffective assistance of appellate counsel can be made based on the record on appeal. Thus, an exhaustive outside-the-record search is not required, and there will often be no need for hearings or discovery to establish that there is no substantial claim of underlying ineffectiveness.[5] The practical effects of applying *Martinez* to substantial claims of ineffective appellate counsel claims will be minimal.

B. *Martinez* applies only to circumstances in which no state court at any level would hear the prisoner's claim.

Applying *Martinez* to claims of ineffective assistance of appellate counsel would not create a general exception to *Coleman*. As in *Martinez*, the error in Davila's state habeas proceeding occurred in the initial-review collateral proceeding, not in the appeal from the initial-review collateral proceeding. *See Martinez*, 566 U.S. at 10 (explaining that *Coleman* did not "determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default"). And like a claim of ineffective assistance of trial counsel, a claim of ineffective assistance

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[5] After a prisoner asserts a substantial claim of ineffective assistance of appellate counsel, in which it appears that a meritorious issue was unreasonably omitted from the appeal, it may be necessary to depose or introduce an affidavit from appellate counsel to evaluate whether there was a strategic reason for this omission.

of counsel on direct appeal must be raised in a collateral proceeding.

As the Court noted in *Martinez*, the combination of these two factors means that "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." 566 U.S. at 10. Unless cause excuses the procedural default and permits the claim to be considered in a federal habeas proceeding, "no court will review the prisoner's claims." *Id.* at 11.

This is a principled line to which this Court can adhere in future cases. There is a critical difference between circumstances in which at least one court has considered a claim on the merits (even if, as in *Coleman*, the claim is subsequently forfeited later in the state process) and circumstances in which the absence of effective assistance of counsel prevents any court from hearing the claim.

Even if there is no additional review, a prisoner whose claim has been considered on the merits by at least one court – even without the prospect of further review – is in a far better position that a prisoner whose claim has never been considered at all.

Nor do the state courts mechanically apply their own procedural rules. *E.g.*, *Mullaney* v. *Wilbur*, 421 U.S. 684, 688 n.7 (1975) ("Respondent did not object to the relevant instructions at trial. The Maine Supreme Judicial Court nevertheless found the issue cognizable on appeal because it had 'constitutional implications.'"). When an issue has already been decided by a

state court on the merits – either on direct appeal or in an initial-review collateral proceeding – a reviewing state court may exercise its discretion to excuse what would otherwise be an adequate and independent procedural bar.

And in extreme circumstances, federal courts will excuse a procedural default "where review of a state prisoner's claim is necessary to correct 'a fundamental miscarriage of justice.'" *Coleman*, 501 U.S. at 748 (*quoting Engle* v. *Isaac*, 456 U.S. 107, 135 (1982)). Analysis of a claim on the merits by a state court aids a federal court in applying this standard, either by revealing or confirming the non-existence of a fundamental miscarriage of justice.

Petitioner thus does not ask the Court to abandon the general rule that a prisoner "must 'bear the risk of attorney error that results in a procedural default.'" *Coleman*, 501 U.S. at 752-753. *Coleman* and *Martinez* are properly harmonized by extending the logic of *Martinez* to ineffective assistance claims involving appellate counsel on the same terms as trial counsel and preserving *Coleman*'s procedural bar whenever at least one court has had the opportunity to address the merits of the claim.

CONCLUSION

The Court should reverse the judgment below, hold that ineffective assistance of counsel in an initial-review collateral proceeding may excuse procedural

default of a substantial claim of ineffective counsel on direct appeal, and remand for application of this rule.

February 27, 2017 Respectfully submitted,

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RECORD
AND
BRIEF

No. 16-6219

In the Supreme Court of the United States

ERICK DANIEL DAVILA, PETITIONER

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Coleman v. Thompson, 501 U.S. 722, 752-54 (1991), held that inadvertence or error by counsel in a proceeding where a State has no responsibility to ensure that a prisoner is represented by competent counsel is not cause to excuse the procedural default of a challenge to the conviction. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012), "qualifie[d] *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez* rested on a combination of (1) the desire to have at least one court evaluate the merits of a claim of trial error, (2) the bedrock nature of the Sixth Amendment right to effective trial counsel, and (3) the "deliberat[e]" choice by the State "to move trial-ineffectiveness claims outside of the direct-appeal process." *Id.* at 11-13. For all other claims, *Martinez* foreclosed this excuse for procedural default. *Id.* at 16 ("The rule of *Coleman* governs in all but the limited circumstances recognized here.").

The question presented is whether the Court should create an additional exception to *Coleman* for substantial claims of ineffective assistance of *appellate* counsel—even though (1) such a claim will turn on an underlying question of law that at least one court has already reviewed on the merits; (2) the right to appellate counsel is not equivalent to the right to trial counsel, which this Court has repeatedly singled out for unique treatment; and (3) States do not "move" claims of ineffective assistance of appellate counsel outside of a process where counsel to help develop the claim is guaranteed.

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STATEMENT

A. Factual Background

In 2008, Nahtica Stevenson was turning nine years old. R.5588.[1] On a Sunday afternoon after church, Nahtica's family threw her a birthday party at the home of her grandmother, Annette Stevenson. J.A. 7-8. Celebrating with Nahtica were more than fifteen family members—including Nahtica's grandmother, Annette; her uncle, Jerry Stevenson; Jerry's five-year-old daughter, Queshawn; three of Nahtica's adult aunts; and several children. J.A. 7-10, 22. Annette Stevenson's home was decorated with a birthday banner and the children wore birthday hats. R.5749, 5783.

Petitioner, a member of the Bloods street gang, drove by Nahtica's party. J.A. 37. Believing that members of a rival gang (the Crips) were present among the people attending the birthday party, petitioner decided—in his words—to "shoot 'em up." J.A. 37 (petitioner's confession). Petitioner's accomplice dropped him off a block away. J.A. 38. Armed with a semi-automatic rifle with a bayonet, laser sight, and large magazine of hollow-point bullets, petitioner crept in between houses towards the party. J.A. 38, 40-43; R.6919.

The children were finishing their cake and ice cream on the front lawn and porch when petitioner opened fire towards the party, pulling the trigger at least ten times. J.A. 8-9, 23-24, 30, 38. As petitioner described in his confession:

> I had a scope on my gun, so I had range. I stood in the field across the street. The fat dude [Jerry Stevenson] was in the middle of the street. The other three were on the porch. I wasn't going to

---

[1] R.*p* refers to the record on appeal in the Fifth Circuit.

> give them a chance to get a gun. . . . I only let off 10 rounds, and I had 21 in the clip. I was trying to get the guys on the porch, and I was trying to get the fat dude.

J.A. 38. The three men that petitioner thought he saw on the porch were actually two women: Sheila Moblin and Annette Stevenson. J.A. 30, 391.

Petitioner missed Jerry Stevenson, who ran into the house. J.A. 17. Frustrated, petitioner opened fire again. J.A. 17. While Annette Stevenson was moving the children to safety inside her house, a bullet struck her in the back and went through her spleen, liver, and heart. J.A. 16, 25, 43, 44-45. The bullet's trajectory suggests that the grandmother was hunched over, shielding the children, when she was hit. *See* R.7048-49. She stumbled inside and fell to the ground in her bedroom, where she died. J.A. 27-28.

During the attack, Jerry Stevenson lost sight of his daughter, Queshawn. J.A. 24-25. He ran outside and found her on the ground, badly wounded by two bullets that had struck her and caused "massive" internal injuries. J.A. 16, 26, 46-48; *see also* J.A. 26 (Jerry Stevenson's testimony that Queshawn's "guts was hanging out"). Queshawn was airlifted to a children's hospital, but the doctors there could not save her. J.A. 28-29.

Petitioner's gunfire also wounded three other children and one adult. J.A. 28. Two shots struck Nahtica's sister, Cashmonae, in the hand, and another grazed the head of Nahtica's cousin, Brianna, slicing a braid of hair from her head. J.A. 13, 28.

When he finished firing, petitioner got in the car driven by his accomplice and fled. J.A. 17, 39. Days later, petitioner was arrested after a high-speed chase and was identified as the shooter. *See* J.A. 32-35.

Petitioner confessed to the murders of Annette and Queshawn Stevenson. J.A. 36-39. Petitioner stated that he did not intend to shoot any women or children, but rather was trying to shoot multiple men—Jerry Stevenson and other men that petitioner thought he saw on Annette Stevenson's porch. J.A. 38 ("I was trying to get the guys on the porch, and I was trying to get the fat dude [Jerry Stevenson].").

B. Judicial Proceedings

1. a. The State charged petitioner with capital murder, which is defined in relevant part as the "murder[] [of] more than one person . . . during the same criminal transaction." Tex. Penal Code § 19.03(a)(7). "Murder," in turn, is defined in relevant part as "intentionally or knowingly caus[ing] the death of an individual." *Id.* § 19.02(b)(1). Applying those statutory provisions, the trial judge instructed the jury as follows:

> Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and both murders were committed during the same criminal transaction, then you will find the defendant guilty of the offense of capital murder.

J.A. 57. *Compare* Pet. Br. 6 (misquoting jury instruction as requiring that multiple deaths be caused "intentionally and knowingly"), *with* J.A. 57 (quoting jury instruction at R.7238: "intentionally or knowingly").

The judge further instructed the jury on the crime's mental-state element as follows: (1) "[a] person acts 'intentionally,' or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result"; and (2) "[a] person acts 'knowingly,' or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result." J.A. 56; *see* Tex. Penal Code § 6.03(a)-(b).

Various types of evidence were presented to the jury, such as eyewitness testimony describing the shooting and identifying petitioner as the shooter. *See, e.g.*, R.5631-35. The jury also heard evidence of petitioner's confession to intending to shoot multiple people at the party, which trial counsel unsuccessfully attempted to exclude. J.A. 36-39; R.795-96, 6682.

During its deliberations, the jury sent a note seeking "clarification of the capital murder charge": "In a capital murder charge, are you asking us did he intentionally murder the specific victims or are you asking us did he intend to murder a person and in the process took the lives of [the two] others"? J.A. 60. In response, the judge proposed resubmitting the instructions quoted above, J.A. 61, and a supplemental mental-state instruction describing the doctrine of transferred intent:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that: a different person was injured, harmed, or otherwise affected.

J.A. 62. This instruction came verbatim from the relevant statute. *See* Tex. Penal Code § 6.04(b) ("A person is nevertheless criminally responsible for causing a re-

sult if the only difference between what actually occurred and what he desired, contemplated, or risked is that: . . . a different person . . . was injured, harmed, or otherwise affected.").

Contrary to implications in petitioner's brief, *see* Pet. Br. 6, 17, 25, his trial counsel did not raise an objection to the substance of the transferred-intent instruction. To preserve an objection to a jury instruction, "the accused is required to distinctly specify each ground of objection." *Pennington v. State*, 697 S.W.2d 387, 390 (Tex. Crim. App. 1985). Petitioner's trial counsel argued that the transferred-intent instruction "should not have been sent to the jury until more deliberation had occurred." J.A. 399 (Fifth Circuit opinion). He did not object to the instruction's substance, only to its timing:

> Mr. Ford: [W]hat we request the Court do is to send the original response the Court had regarding intentionally and knowingly.
>
> The Court: Which refers to the law and defines it.
>
> Mr. Ford: That's right.
>
> The Court: Right.
>
> Mr. Ford: And *wait. And – until the jury indicates they can't reach – reach a resolution. And then at that point, submit the other special charge*, if it's called for, Judge. We'd object to submission of both charges—well, we'd object to the submission of the second charge.

J.A. 51-52 (emphasis added). As that colloquy shows, petitioner's trial counsel in fact endorsed the substance of the transferred-intent instruction—agreeing that the court should, after further jury deliberation resulting in impasse, "then at that point, submit the other special

charge." J.A. 52. Petitioner thus preserved only an objection to the timing of the transferred-intent instruction, not to its substance. And contrary to an implication in petitioner's brief, trial counsel did not request any other "clarif[ying]" instruction. Pet. Br. 7; *see* J.A. 51-52.

The trial court overruled the timing objection and submitted the transferred-intent instruction along with its original instructions on the elements of the crime. J.A. 52. The jury returned a guilty verdict on capital murder. *See* R.11400.

b. During the penalty phase of petitioner's trial, the jury heard significant evidence of petitioner's violent propensities. For instance, the jury heard evidence implicating petitioner in a separate murder. Among this evidence was petitioner's confession to that murder, which petitioner's counsel unsuccessfully sought to exclude. J.A. 63-67; R.795-96, 7356-63. The jury further heard an eyewitness testify that petitioner shot the victim in that murder while the victim was running away and that, after the victim had fallen to the ground, petitioner "walked over to" the victim "and shot him four more times in his back." J.A. 67-69.

The jury also heard evidence of petitioner's participation in an armed robbery of two men. J.A 52-54. And the jury heard several witnesses describe petitioner's attempted escape from the Tarrant County jail while awaiting trial for the murders of Annette and Queshawn Stevenson. J.A. 70-84. During the escape attempt, petitioner and his accomplices stabbed and severely beat two guards. J.A. 70-84.

The jury deliberated and returned answers to the penalty-phase questions. R.11400-01. In accordance with those answers, the trial court sentenced petitioner to death. R.11401.

2. Petitioner's appeal was submitted directly to the Texas Court of Criminal Appeals because he received the death penalty. *See* Tex. Code Crim. Proc. art. 37.071(h). The State appointed petitioner new counsel for his appeal. *See* J.A. 85; Tex. Code Crim. Proc. art. 26.052(j).[2] Petitioner's appellate counsel filed a 94-page brief raising fourteen points of error, all of which were properly preserved by trial counsel. J.A. 86-90; R.10749-873. Most of petitioner's challenges to his conviction were aimed at the trial court's refusal to suppress his confessions. *See* J.A. 86-89.

On appeal, petitioner did not raise an unpreserved challenge to the transferred-intent jury instruction. He did argue that the evidence was insufficient to satisfy that instruction. *See* J.A. 86, 91-102. In making this argument, petitioner relied on the same case that he relies on here (Pet. Br. 4)—*Roberts v. State*, 273 S.W.3d 322 (Tex. Crim. App. 2008)—to argue "that the doctrine of transferred intent could not be utilized to . . . sustain [petitioner's] capital murder conviction" because the evidence purportedly showed that petitioner had the specific intent to kill only one person, Jerry Stevenson. J.A. 97-101. Citing *Roberts*, petitioner argued that because his specific intent to kill was purportedly aimed at only one person, it could not support a conviction for murdering two people. J.A. 97-101.

The Court of Criminal Appeals affirmed petitioner's conviction and sentence. *See* J.A. 104. The court rejected petitioner's challenge to the sufficiency of the evidence concerning mental state. It first noted "ample ev-

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[2] Petitioner's appellate counsel is, and was at the time of the appeal, board-certified in Texas criminal law. *See* Tex. Bd. of Legal Specialization, Profile of Mary Brabson Thornton, https://perma.cc/JYA7-8C97.

idence in the record to support a verdict that appellant intended to cause more than one death":

> The evidence shows that appellant intended to kill possible members of the Crips gang, but he mistakenly killed a grandmother and small child instead. As appellant himself explained, he went to "a shoot em up" in which he intended to kill "the fat dude in the middle of the street" and the three "guys on the porch." That is, he intended to shoot four males, not two females. But, under Texas law, the intent to kill four males will transfer to the unintentional killing of two females.

J.A. 113. The court also observed that, as an alternative culpable mental state, the jury could find that petitioner "knew that he was reasonably certain to[] cause two deaths when he repeatedly shot his SKS semi-automatic rifle at the birthday party group on Ms. Stevenson's front porch." J.A. 115; *see* Tex. Penal Code § 19.02(b)(1).

3. Petitioner initiated state-court habeas review of his judgment of conviction. J.A. 133. Pursuant to state law, the State provided petitioner new counsel for that proceeding. J.A. 133; *see* Tex. Code Crim. Proc. art. 11.071 § 2.[3] Petitioner asserted three grounds for relief. Two of his three claims challenged Texas's death-penalty procedures. J.A. 134. His third claim asserted ineffective assistance of counsel at trial, arguing that his trial counsel failed to conduct a sufficient mitigation investigation. J.A. 134-39; *see Wiggins v. Smith*, 539 U.S. 510 (2003). Petitioner did not contend that his ap-

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[3] Petitioner's state-habeas counsel is, and was at the time of state habeas proceedings, board-certified in Texas criminal law. *See* Tex. Bd. of Legal Specialization, Profile of David L. Richards, https://perma.cc/4XHF-8ZYY.

pellate counsel was ineffective, nor did he bring a claim challenging the transferred-intent jury instruction.

After an evidentiary hearing, the state trial court recommended that relief be denied. *Ex Parte Davila*, No. WR-75356-01, 2013 WL 1655549, at *1 (Tex. Crim. App. Apr. 17, 2013) (per curiam). The Court of Criminal Appeals accepted the trial court's recommendation and denied relief. *Id.*

4. a. Petitioner then sought habeas relief in federal court. New counsel was again appointed for these federal habeas proceedings. J.A. 140-41; *see* 18 U.S.C. § 3599. Petitioner's eleven claims largely tracked the claims raised by his state appellate and habeas counsel. *Compare* J.A. 174-76, *with* J.A. 86-90, 134. Petitioner also raised an ineffective-assistance-of-appellate-counsel (appellate-IAC) claim for the first time, arguing that his direct-appeal counsel was ineffective for failing to challenge the trial court's transferred-intent instruction. J.A. 175, 223-31. Petitioner did not raise an ineffective-assistance-of-trial-counsel (trial-IAC) claim regarding the transferred-intent instruction.

The reasoning underlying petitioner's appellate-IAC claim is as follows: According to petitioner, the jury's note "clearly suggested that the jury believed [petitioner] had intended to kill" only "one person." J.A. 225. Petitioner then reasons that the trial court's transferred-intent jury instruction was "incorrect" because it "did not clarify that [petitioner] must intend to kill two distinct people before he could be convicted of a capital murder." J.A. 225. Perhaps recognizing that his trial counsel did not preserve an objection to the substance of the transferred-intent instruction, petitioner insists that "even if the objection lodged by the defense counsel was not sufficient to specifically cover the charging error, relief would still have been granted had the issue

been raised on appeal" because the trial court's alleged error was supposedly "egregious." J.A. 228-29. And petitioner asserts that appellate counsel was constitutionally inadequate for failing to raise this unpreserved issue because it was purportedly "the strongest appellate point of error in [his] case," notwithstanding that the remaining points of error were all preserved for appellate review. J.A. 146.

Petitioner acknowledges that his appellate-IAC claim is procedurally defaulted because he failed to present it to the state habeas court. J.A. 146. But petitioner argues that the supposed ineffectiveness of his state-habeas counsel "constitute[s] cause and prejudice to excuse any default." J.A. 146; *see* J.A. 240-41.

The federal district court denied petitioner relief. J.A. 316-87. The court held that petitioner's appellate-IAC claim is procedurally defaulted, and the court cited binding Fifth Circuit precedent holding that allegations of ineffective assistance of state-habeas counsel cannot excuse the default of an appellate-IAC claim. J.A. 360-61; *see also* R.504-06. The district court went on to conclude that, in any event, petitioner's appellate counsel was not constitutionally inadequate because (1) the trial court's transferred-intent jury instruction was correct, and (2) any supposed confusion in that instruction could not have harmed petitioner because he confessed to "intend[ing] to kill more people than he actually did." J.A. 361-68; *accord* J.A. 328 ("the record establish[es] that [petitioner] had the intent to kill multiple individuals").

b. The Fifth Circuit denied petitioner a certificate of appealability (COA). J.A. 389-412. Like the Court of Criminal Appeals and the federal district court, the Fifth Circuit noted that petitioner's confession "reveals an intent to kill at least four persons." J.A. 398. Relying on binding precedent, the Fifth Circuit also noted that

the alleged ineffectiveness of petitioner's state-habeas counsel could not excuse the default of his appellate-IAC claim. J.A. 399-400 (citing *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir.), *cert. denied*, 135 S. Ct. 435 (2014)).

SUMMARY OF ARGUMENT

I. In *Martinez v. Ryan*, 566 U.S. 1 (2012), this Court gave three reasons for exempting certain trial-IAC claims from *Coleman*'s rule that the alleged ineffectiveness of a prisoner's state-habeas counsel is not cause to excuse the bar on habeas claims procedurally defaulted in state court. None of the three reasons given in *Martinez* warrants treating appellate-IAC claims the same as trial-IAC claims. And additional equitable reasons also counsel against expanding *Martinez*.

A. First, the "key" to *Martinez* was the Court's concern "that no state court at any level will hear the prisoner's" asserted "trial error." *Id.* at 10-12. This interest is almost uniformly absent in substantial appellate-IAC claims because they almost always involve questions of law or fact reviewed by the trial court and thus preserved for appeal. This is a critical difference between trial-IAC and appellate-IAC claims. *Cf.* Pet. Br. 30. Extending *Martinez* to appellate-IAC claims would entail significant costs yet would not produce the foremost benefit identified in *Martinez*—that is, avoiding a situation where no court could adjudicate an underlying claim of trial error.

Petitioner tries to manufacture similarity between the two types of claims by focusing on the risk that the appellate-IAC claim itself will go unreviewed. Pet. Br. 14. But *Martinez* did not turn on the need to review any type of claim that a prisoner might belatedly raise on federal habeas review. Instead, it sought to ensure that

there was at least one adjudication "on the merits" of the alleged "*trial* error" underlying a conviction. 566 U.S. at 11-12 (emphasis added). *Martinez* expressly rejected the proposition that its reasoning extended to "attorney errors *in other kinds of proceedings*." *Id.* at 16 (emphasis added). The "criminal trial," after all, "is the 'main event' at which a defendant's rights are to be determined." *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

The nature of petitioner's own appellate-IAC claim confirms that an extension of *Martinez* is not necessary to ensure that at least one court can review an asserted trial error. Petitioner challenges the substance of a jury instruction. If his trial counsel had objected to it, the claimed error would have been reviewed in the trial court. And because trial counsel did not object, a trial-IAC claim would be the direct, logical vehicle for petitioner's newfound dispute with the failure to challenge that instruction. A new exception to *Coleman* is thus unnecessary to ensure that at least one court will have adjudicated an underlying claim of trial error.

B. Second, *Martinez* recognized that the right to trial counsel has unique significance as "the foundation for our adversary system"—necessary to "test[] the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Martinez*, 566 U.S. at 12.

Martinez thus singled out trial-IAC claims for special treatment. Likewise, this Court has repeatedly distinguished the right to trial counsel from all other rights, including the right to appellate counsel. *Martinez* is one of several decisions relying on the unique nature of the right to trial counsel to justify exceptions to otherwise blanket rules. *See, e.g.*, *Whor-*

ton v. Bockting, 549 U.S. 406, 419 (2007); *Daniels v. United States*, 532 U.S. 374, 382 (2001); *Custis v. United States*, 511 U.S. 485, 493-96 (1994); *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938).

Petitioner tries to equate the right to trial counsel with the right to appellate counsel, but this Court has said many times that the two rights are quite different. Their differences begin with their sources: the right to trial counsel is expressly guaranteed in the Sixth Amendment, while the right to appellate counsel has been recognized based on more general provisions in the Fourteenth Amendment. *See Halbert v. Michigan*, 545 U.S. 605, 610-11 (2005). The proceedings to which the rights respectively attach are also meaningfully different. *See Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974). As already noted, the "criminal trial is the 'main event.'" *McFarland*, 512 U.S. at 859. An appeal, on the other hand, is not "central to an accurate determination of innocence or guilt." *Goeke v. Branch*, 514 U.S. 115, 120 (1995) (quotation marks omitted). In fact, "it is well settled" that there is not even a "constitutional right to an appeal" in criminal cases. *Abney v. United States*, 431 U.S. 651, 656 (1977). The right to appellate counsel, while surely important, is not foundational and cannot justify the same treatment as the right to trial counsel.

C. Third, unlike the situation in *Martinez*, Texas did not "choos[e] to move" appellate-IAC claims into a proceeding where effective counsel is not guaranteed. 566 U.S. at 13. The constitutional right to effective counsel extends only through one level of direct appellate review. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). It is natural that appellate-IAC claims will be available only in a proceeding itself lacking a constitutional right to counsel. No State bears responsibility for this state of affairs, and that point undermines any ar-

gument for burdening States with the cost of defending defaulted appellate-IAC claims.

D. Additional equitable considerations also counsel against expanding *Martinez* to appellate-IAC claims. First and foremost, doing so will "put a significant strain on state" and federal resources. *Martinez*, 566 U.S. at 15. Unlike the exception for trial-IAC claims, which is limited to States that channel such claims to collateral review, an exception for appellate-IAC claims would extend to all jurisdictions. And because appellate-IAC claims are a gateway to federal review of underlying complaints about trial, the incentive to bring defaulted appellate-IAC claims is strong. If petitioner prevails, *Coleman*'s bar on consideration of appellate-IAC claims not presented in state court will no longer provide a necessary brake on these claims.

The cost of this flood of previously precluded claims would be borne by States and the federal Judiciary, which share no responsibility for a procedural default. And expanding *Martinez* will harm important interests in comity and finality. In order to avoid "undermin[ing] the usual principles of finality of litigation," "degrad[ing] the prominence of the trial itself," and "impos[ing] special costs on our federal system," *Engle v. Isaac*, 456 U.S. 107, 126-28 (1982), petitioner's request to expand *Martinez* should be rejected.

II. Even if the Court were inclined to create an exception to *Coleman*'s bar on defaulted appellate-IAC claims, the denial of petitioner's request for a COA should still be affirmed. The district court rejected petitioner's appellate-IAC claim for the alternative reason that it lacked merit, and petitioner has made no "substantial showing" of the merit of his claim. 28 U.S.C. § 2253(c)(2) (COA standard). It is beyond reasonable debate that the performance of petitioner's

appellate counsel was not deficient for the same reason that petitioner cannot show prejudice: the substance of the transferred-intent instruction was not objected to in trial court, was drawn verbatim from the governing statute, and could present no substantial harm even on petitioner's view given the overwhelming evidence of petitioner's guilt—including his spraying a group of people with gunfire and his confessed intent to kill multiple people.

ARGUMENT

I. *Martinez* Should Not Be Extended to Appellate-IAC Claims.

Martinez unambiguously held that its exception was cabined to trial-IAC claims only: "*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause [to excuse procedural default], and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial." *Martinez*, 566 U.S. at 15.[4]

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[4] All but one court of appeals to consider the issue has concluded that "[u]nder *Martinez*'s unambiguous holding," "ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel." *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013); *accord Dansby v. Hobbs*, 766 F.3d 809, 833 (8th Cir. 2014); *Reed*, 739 F.3d at 778 n.16 (5th Cir.); *Gore v. Crews*, 720 F.3d 811, 817 (11th Cir. 2013) (per curiam); *Banks v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012) (Gorsuch, J.); *see also Hunton v. Sinclair*, 732 F.3d 1124, 1126 (9th Cir. 2013) (applying *Martinez*'s limiting language to reject a *Coleman* exception for *Brady* claims); *but see Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1293-94 (9th Cir. 2013). Petitioner contends that this body of authority has not "identified any principled distinction" of *Martinez*. Pet. Br. 22. That would not be unusual, given that lower courts have no discretion to override this Court's holdings, but petitioner is wrong in any event. *See Dansby*, 766 F.3d at 833.

Petitioner now asks the Court to withdraw its reaffirmation of *Coleman* outside of the narrow *Martinez* exception. He provides no persuasive reason to do so. Petitioner relies on the three reasons animating *Martinez*, *see* Pet. Br. 13, which he asserts apply equally to his appellate-IAC claim. But none of those reasons support extending *Martinez* to appellate-IAC claims.

First, and most importantly, in cases raising substantial appellate-IAC claims, the trial court will have already addressed the underlying assertion of trial error. For an appellate-IAC claim to be substantial, the underlying issue must have been preserved at trial. In contrast, the Court in *Martinez* was principally concerned with the risk "that no state court at any level will hear the prisoner's claim" of a trial error. *Martinez*, 566 U.S. at 10. That chief concern behind *Martinez* is absent here, so it cannot justify a further exception for appellate-IAC claims.

Second, *Martinez* recognized that the right to counsel at trial is fundamental because the trial "is the 'main event,'" *McFarland*, 512 U.S. at 859, where claims must originate and where guilt or innocence is adjudicated. The right to appellate counsel is different. The Court has repeatedly rejected any suggestion of equivalence between trials and appeals, including expressly distinguishing the two for purposes of retroactivity and structural error. *Martinez* was just the latest in a long line of decisions according special treatment to the right to trial counsel.

Third, unlike the trial-IAC claim in *Martinez*, States do not "move" or deliberately "channel" appellate-IAC claims from a proceeding in which counsel is constitutionally guaranteed to one without such a guarantee. Whereas *Martinez* reasoned that this channeling justified treating state-habeas counsel like the counsel that

a prisoner would be guaranteed on direct appeal (whose inadequate assistance can be cause to excuse a default), there is no constitutional guarantee of counsel to develop an appellate-IAC claim. This too reflects the different treatment of appellate counsel and the fact that the right to counsel necessarily ends at some point.

Finally, additional equitable considerations counsel against extending *Martinez* to appellate-IAC claims. It would impose significant burdens on state and federal resources and encourage sandbagging. Moreover, federal review of state convictions is inherently costly in terms of finality and comity, and those costs rise significantly when prisoners fail to present their claims first in state court. It is not equitable to impose these costs given the absence of a compelling reason to do so.

A. At least one court will have already reviewed allegations of trial error underlying a substantial appellate-IAC claim.

By its nature, a substantial appellate-IAC claim will involve an underlying assertion of trial error that the trial court has already adjudicated. That is a crucial distinction from the trial-IAC claims at issue in *Martinez*.

1. The foundation of *Martinez* is its concern for avoiding a system in which "it is likely that no state court at any level will hear" the prisoner's "claim of trial error." *Martinez*, 566 U.S. at 10, 12. That concern arose with trial-IAC claims defaulted on state habeas because of the nature of those claims. The typical trial-IAC claim will involve one of three allegations: trial counsel failed to raise an error at trial, failed to properly prepare for trial, or provided poor advice to a defendant. *See* 2 Brian R. Means, *Postconviction Remedies* § 35:4 at 486-88 (2016 ed.). In the first scenario, the purported trial error would have gone unreviewed by the trial

court, likely unreviewed by the appellate court (barring plain-error-type review), and unreviewed by the habeas court (assuming the trial-IAC claim was defaulted there). In the latter two scenarios, which involve counsel's preparation or advice, and thus "often turn[] on evidence outside the trial record," the claims would go unreviewed in a system like Arizona's in *Martinez*, again assuming the claim was defaulted on state habeas. 566 U.S. at 12. So, for all three scenarios, the allegation of trial error underlying a defaulted trial-IAC claim would have gone unreviewed by any court.

In stark contrast, the allegation of trial error underlying a substantial appellate-IAC claim will have been reviewed by the trial court. Preservation of an issue in trial court is essential to showing that a failure to raise that issue on appeal was deficient performance by appellate counsel.[5] So for most appellate-IAC claims raised in practice—and for basically all such claims that are "substantial," Pet. Br. i, 11, 13, and thus within the exception that petitioner seeks—the assertion of trial error that was not raised on appeal *will* have been raised and adjudicated in trial court.

Thus, the central pillar of *Martinez*'s exception for trial-IAC claims is not present for substantial appellate-IAC claims. Indeed, *Martinez* distinguished the facts of *Coleman* on a similar basis, 566 U.S. at 10, recognizing

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[5] 2 Means, *supra*, § 35:19 at 627 ("the failure to raise issues not preserved for review by timely objection in the trial court does not constitute ineffective assistance of appellate counsel"); *accord, e.g.*, *Aparicio v. Artuz*, 269 F.3d 78, 96 (2d Cir. 2001) (holding that appellate counsel cannot be deficient in failing to raise unpreserved claim of error); *Chateloin v. Singletary*, 89 F.3d 749, 755 (11th Cir. 1996) (same); *Tisius v. State*, 183 S.W.3d 207, 213 (Mo. 2006) (same); *Randolph v. State*, 853 So. 2d 1051, 1066 (Fla. 2003) (per curiam) (same).

that *Coleman* barred consideration of a defaulted claim after noting that Coleman had been able to "present a challenge to his conviction" and "one state court"—a trial court—had addressed Coleman's claim. 501 U.S. at 755.[6]

2. Moreover, even outside the mine-run of appellate-IAC claims, *Martinez*'s rationale still does not support the extension that petitioner seeks. Even in the unusual case of an attack on appellate counsel for failing to raise an issue unpreserved in trial court, that very failure to preserve the issue in trial court would almost invariably allow a parallel trial-IAC claim already covered by the existing *Martinez* exception.

In fact, such a trial-IAC claim would be stronger than the parallel appellate-IAC claim because appellate review of unpreserved claims (and thus appellate strategy regarding those claims) is constrained by demanding standards of review. For example, Texas's standard for appellate review of issues not preserved in trial court—akin to the federal plain-error standard—is so demanding that trial counsel's failure to object to an error that would satisfy this appellate standard of review "would almost always amount to ineffective assistance of [trial] counsel." *Posey v. State*, 966 S.W.2d 57, 71 (Tex. Crim. App. 1998) (Womack, J., concurring). So, as to any appellate-IAC claim based on a legal objection not preserved in trial court, it would be the rare and

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[6] There is no merit to petitioner's suggestion that prisoners whose trial counsel properly objected at trial are "worse off" than those whose trial counsel failed to object. Pet. Br. 24-26. When trial counsel raises an argument, the trial court has the opportunity to address and rule on the issue. So the underlying claim of trial error "will have been addressed by one court" in that scenario, which is the baseline that *Martinez* seeks to ensure. *Martinez*, 566 U.S. at 11.

perhaps illusory circumstance in which *Martinez*'s exception for trial-IAC claims is not already a complete remedy.

Such a circumstance may never materialize in practice. At the least, it does not arise here. Petitioner could have challenged trial counsel's performance for failing to raise the same instructional objection that appellate counsel is now challenged for not raising on appeal. *See supra* pp. 5-6. And if petitioner had brought a trial-IAC claim, he could have sought to use the existing *Martinez* exception to excuse the default of that claim on state habeas.

In short, even prisoners bringing unusual appellate-IAC claims like petitioner's (based on issues not preserved in trial court) virtually always have an avenue under existing case law to ensure that the underlying allegation of trial error is reviewed by at least one court.[7] Even for these appellate-IAC claims based on

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[7] Hypothetically, there could be cases in which an appellate-IAC claim presents concerns like those in *Martinez* yet is not covered by *Martinez* and the availability of a parallel trial-IAC claim: where a fundamental change of law on a preserved legal issue occurs after trial but is not raised by either appellate or state-habeas counsel, and the change in law is so momentous that failure to heed it rises above mere "ignorance or inadvertence." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). In that narrow, hypothetical situation, it would be true that no court will have considered the legal issue under the controlling legal framework yet a trial-IAC claim would not be available as an equal or better alternative to an appellate-IAC claim. It is doubtful whether such a momentous legal change would ever go unnoticed in practice by both appellate and habeas counsel. Respondent has not located a single case where this has occurred, and petitioner does not identify one either. In any event, even if that hypothetical possibility concerns the Court, that limited scenario could not justify a ruling in this case recognizing a broad extension of *Martinez* for all appellate-IAC claims.

arguments not preserved at trial, the availability of a parallel trial-IAC claim counsels against an unnecessary extension of *Martinez*. *See Dretke v. Haley*, 541 U.S. 386, 394 (2004); *McCleskey v. Zant*, 499 U.S. 467, 481 (1991). And this alternative remedy under *Martinez* is already in addition to the backstop provided by the separate "miscarriage of justice" exception to various procedural barriers. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931-32 (2013).

Of course, petitioner chose to bring an appellate-IAC claim while foregoing a trial-IAC claim regarding the transferred-intent jury instruction. Whatever the reason for this decision, petitioner's strategic choice in this case is no reason to extend *Martinez* unnecessarily to all appellate-IAC claims.

B. The right to trial counsel is uniquely important and different from the right to appellate counsel.

Martinez also relied on the specific nature of a unique type of trial error: denial of the "bedrock" right to effective assistance of counsel at *trial*. 566 U.S. at 12. In doing so, *Martinez* continued in a long tradition of treating the right to trial counsel as special, "reflect[ing] the unique importance of the assistance of competent counsel before final judgment is imposed by the trial court, perhaps the most important of all of the trial-related rights protected by the Sixth Amendment." 7 Wayne R. LaFave et al., *Criminal Procedure* § 28.4(d) at 258 (4th ed. 2015); *accord, e.g.*, Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 Yale L.J. 2428, 2455 (2013) (cited at Pet. Br. 28) ("*Gideon*'s promise is that every person accused of a crime will have competent representation when he needs it the most—before he is convicted.").

Petitioner and the amici supporting him try to evade this limiting principle by urging the Court to treat the rights to trial and appellate counsel as equivalent. Pet. Br. 16-17; Br. for the Nat'l Assoc. of Criminal Defense Lawyers and the Am. Civil Liberties Union as Amici Curiae (NACDL Br.) at 6-13. But the Court has repeatedly made clear that the right to trial counsel is different—in a category all its own. And the Court has specifically recognized that the right to counsel on appeal is different from, and not as vital as, the right to counsel at trial. The right to appellate counsel is not expressly guaranteed in the Constitution. It is not central to the determination of guilt or innocence. And the failure of appellate counsel to make any argument on behalf of a defendant is not structural error. *Martinez*'s departure from principles of finality and federalism in order to promote the right to trial counsel does not similarly justify a departure from settled claim-processing principles for the quite different right to appellate counsel.

1. The right to trial counsel, which "is the right to effective assistance" of trial counsel, *Missouri v. Frye*, 566 U.S. 133, 138 (2012), is of "unique" importance in the criminal justice system, *Custis*, 511 U.S. at 494. In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), the Court unanimously described the right to appointed trial counsel as necessary to the great and "noble ideal" of fair trials.[8] "[S]ince then, American rhetoric has hailed *Gideon*'s promise of equal justice as one of the most im-

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[8] "Attorney General Robert Kennedy[] stated a few months after the 1963 ruling" that it changed "'the whole course of American legal history.'" Eric H. Holder, Jr. & Dick Thornburgh, Gideon—*A Watershed Moment*, Champion (June 2012), http://www.nacdl.org/Champion.aspx?id=24999 (quoting Robert Kennedy).

portant in the criminal justice system." J. Harvie Wilkinson III, *The Dual Lives of Rights*, 98 Cal. L. Rev. 277, 285-86 (2010) (quotation marks omitted).

The right to trial counsel has been deemed a necessary precursor to all other procedural rights: the "master key to all the rules and procedures" of the criminal trial. Yale Kamisar, Panel Discussion, Gideon *at 40: Facing the Crisis, Fulfilling the Promise*, 41 Am. Crim. L. Rev. 135, 150-51 (2004); *accord United States v. Cronic*, 466 U.S. 648, 654-56 (1984); Brandon L. Garrett, *Validating the Right to Counsel*, 70 Wash. & Lee L. Rev. 927, 929 (2013) ("[T]he Sixth Amendment right to counsel [is] ... a central ... means for regulating the entire criminal process."). The Court has even suggested that the guarantee of effective trial counsel, and its aid in truth-finding, is itself a powerful justification for limits on collateral review. *See Boumediene v. Bush*, 553 U.S. 723, 790-91 (2008). *Martinez* thus described the right to effective trial counsel as "a bedrock principle"—"the foundation for our adversary system"—necessary to "test[] the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." 566 U.S. at 12.

This Court's other decisions concur, and *Martinez* is not alone in treating the right to trial counsel as unique. For example, in applying the retroactivity bar established in *Teague v. Lane*, 489 U.S. 288 (1989), the Court has repeatedly refused to characterize new rules of procedure as "watershed" because each fails to measure up to the right to trial counsel. *See, e.g.*, *Beard v. Banks*, 542 U.S. 406, 420 (2004); *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997); *Saffle v. Parks*, 494 U.S. 484, 495 (1990). The Court has described *Gideon* as "the only case that [it has] identified as qualifying under" *Teague*. *Whorton*

v. Bockting, 549 U.S. 406, 419 (2007); *see also id.* ("The *Crawford* [*v. Washington*, 541 U.S. 36 (2004),] rule is in no way comparable to the *Gideon* rule."). In contrast, the Court has expressly held that the right to appeal—and thus *a fortiori* the right to appellate counsel—does not match the right to trial counsel because it is not "central to an accurate determination of innocence or guilt." *Goeke*, 514 U.S. at 120 (quoting *Graham v. Collins*, 506 U.S. 461, 478 (1993)).

Like *Martinez*, other decisions of this Court have also reasoned that only the right to trial counsel justified "an end run around . . . procedural barriers that would preclude the movant from attacking [his] prior conviction." *Daniels*, 532 U.S. at 383. In *Custis*, the Court recognized the availability of collateral review of convictions used for sentencing enhancement *only* on the basis of an alleged violation of the right to trial counsel, declaring that right "unique" and "declin[ing]" the invitation to extend the collateral-attack rule "beyond the right to have appointed counsel established in *Gideon*." 511 U.S. at 493-96. In *Daniels*, the Court allowed federal prisoners to use the rule of *Custis* while again recognizing the rule's sole exception for the "unique" right to trial counsel. 532 U.S. at 378.

And during the period when collateral attack on federal convictions was limited to jurisdictional infirmities, the Court uniquely deemed "the Sixth Amendment" right to trial counsel as "an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Johnson*, 304 U.S. at 467.

2. Contrary to the suggestion of petitioner and his supporting amici, the rights to trial and appellate counsel differ in meaningful ways. The latter does not justify a costly exception to *Coleman*.

The differences between the two rights begin with their respective sources. Unlike the right to trial counsel, the right to appellate counsel is not expressly guaranteed in the Constitution. Petitioner and the Ninth Circuit misstate the source of the right to appellate counsel as the Sixth Amendment. Pet. Br. 16; *Nguyen*, 736 F.3d at 1296. But the Sixth Amendment guarantees only effective counsel at trial and trial-related proceedings. *See Frye*, 566 U.S. at 140; *Cronic*, 466 U.S. at 658 ("Absent some effect of challenged conduct on the reliability of the *trial process*, the Sixth Amendment guarantee is generally not implicated.") (emphasis added). As opposed to such an express right, "the precise rationale for the" right to appellate counsel "has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment and some from the Due Process Clause of that Amendment." *Smith v. Robbins*, 528 U.S. 259, 276 (2000) (quotation and alteration marks omitted). The right to appellate counsel is part of a class of procedural protections designed to aid indigent defendants on appeal. *See Halbert*, 545 U.S. at 610-11.; *Bearden v. Georgia*, 461 U.S. 660, 664-67 (1983).

In addition to arising from different sources, the two rights serve different purposes. The right to trial counsel is "a bedrock principle" forming "the foundation" of our adversarial criminal system. *Martinez*, 566 U.S. at 12. But "other rights to representation grounded in general concepts of due process, such as assistance during direct appeal . . . , lack this singular quality." 7 LaFave, *supra*, § 28.4(d) at 258-59. The "criminal trial is the 'main event' at which a defendant's rights are to be determined." *McFarland*, 512 U.S. at 859. As petitioner recognizes, unlike appeals, "[a] prisoner is physically present for trial and, particularly in death penalty

matters, works closely with trial counsel for an extended period of time, literally sitting at counsel's elbow through the trial." Pet. Br. 15.

In contrast, "it is well settled" that there is not even a "constitutional right to an appeal." *Abney*, 431 U.S. at 656; *accord Smith*, 528 U.S. at 270 n.5 ("The Constitution does not ... require States to create appellate review in the first place.").[9] As such, the right to appellate counsel is conditional—a far cry from the bedrock right to trial counsel. For similar reasons, even the total failure of appellate counsel to offer an argument on behalf of a defendant, unlike the absence of trial counsel, is not structural error. *Compare Cronic*, 466 U.S. at 658-59, *with Smith*, 528 U.S. at 288-89.

Ross further undermines any purported equivalence between the rights to trial and appellate counsel. 417 U.S. at 611. *Ross* confirms that the lesser status of the right to appellate counsel follows from its conditional nature. *Id.* *Ross* also details the "significant difference[]" between the respective purposes of the "trial and appellate stages of a criminal proceeding," which points out the different status of the two rights:

> The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant,

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[9] An appeal as of statutory right in federal death-penalty cases was established only in 1889, and "[a] general [statutory] right of appeal in [federal] criminal cases was not created until 1911." *Abney*, 431 U.S. at 656 n.3.

> argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."
>
> By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.

Id. at 610-11 (citation omitted; quoting *Gideon*, 372 U.S. at 344); *accord Goeke*, 514 U.S. at 120 (explaining that the right to appeal is not "central to an accurate determination of innocence or guilt").

The important differences between the bedrock right to the "shield" of trial counsel and the right to the "sword" of appellate counsel confirm that *Martinez* soundly limited its exception to trial-IAC claims. 566 U.S. at 16.

C. States do not deliberately channel appellate-IAC claims out of a proceeding where counsel is constitutionally guaranteed.

1. The third basis for *Martinez*'s holding was the State's "deliberate[] cho[ice] to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed," thereby "significantly diminish[ing] prisoners' ability to file such claims." *Id.* at 13. That dynamic is not present here. In contrast to trial-IAC claims, States do not and cannot move an appellate-IAC claim away from a proceeding in which counsel is constitutionally guaranteed to assist in filing the claim.

This Court has recognized that, if a State chooses a system that significantly diminishes a prisoner's ability to file a claim in state court, there is less encroachment on comity if a federal court hears that claim for the first time. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) (explaining that the "application of the cause-and-prejudice standard" must "appropriately accommodate concerns of finality, comity, judicial economy, and *channeling the resolution of claims into the most appropriate forum*") (emphasis added); *cf. O'Neal v. McAninch*, 513 U.S. 432, 443 (1995) ("[T]he State's interest in [finality] . . . is somewhat diminished" where "the State . . . bears responsibility for the error.").

Martinez thus reasoned that "when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding" where effective counsel is not guaranteed, as opposed to the direct appeal where all other trial errors are heard with the assistance of counsel, the State has "impeded or obstructed" the petitioner's "compl[iance] with the State's established procedures." 566 U.S. at 13-14. This "deci-

sion" by the State, *Martinez* explained, has "consequences for the State's ability to assert a procedural default in later proceedings." *Id.* at 13.

In contrast, appellate-IAC claims by their nature must be brought in proceedings where effective counsel is not constitutionally guaranteed. That is not due to any choice by a State to channel them away from another proceeding. It is because the constitutional "right to appointed counsel extends to the first appeal of right, and no further." *Finley*, 481 U.S. at 555. Because appellate-IAC claims will not accrue until after the "first appeal of right" has ended, *id.*, they are inherently incapable of being presented on direct appeal. It is inevitable that they will be raised in a subsequent proceeding in which counsel is not constitutionally guaranteed. Because Texas has not used "state procedural law," *Trevino v. Thaler*, 133 S. Ct. 1911, 1914 (2013), to erect an impediment or obstacle to the vindication of the right to appellate counsel, the State's interests in finality and respect for its procedural rules are not diminished.

2. Far from erecting impediments or obstacles, Texas has gone to great lengths to promote access to counsel in state habeas proceedings challenging a capital conviction. In 2009, Texas created a state agency called the Office of Capital and Forensic Writs (OCFW) for the express purpose of ensuring that capital-case prisoners receive access to counsel in their state postconviction proceedings, if they desire it. *See* Act of May 20, 2009, 81st Leg., R.S., ch. 781, 2009 Tex. Gen. Laws 1972. The OCFW's exclusive function is to represent indigent capital-case petitioners in state postconviction proceedings. Tex. Gov't Code § 78.054.

The OCFW is staffed by a number of accomplished lawyers and five post-conviction investigators.[10] Per state law, OCFW may decline an appointment as state postconviction counsel only for good cause, such as a conflict of interest. *See* Tex. Gov't Code § 78.054(a). Texas also maintains rigorous requirements for appointed counsel in the event that OCFW cannot represent an indigent petitioner in a capital case. *See* Tex. Code Crim. Proc. art. 11.071 § 2(f); Procedures Regarding Eligibility for Appointment of Attorneys as Counsel Under Article 11.071, Section 2(f), https://perma.cc/DNE7-VCFW; Tex. Office of Court Admin., Application for Appointment of Counsel Pursuant to Article 11.071, https://perma.cc/22VF-J288.

3. Petitioner and his supporting amici observe that both channeled-trial-IAC claims and appellate-IAC claims can first be raised only in state collateral proceedings. *See* Pet. Br. 19-22; NACDL Br. 17-18. But they ignore the essential role that "deliberate[]" state action played in *Martinez*'s analysis. 566 U.S. at 13. *Martinez* made clear that it was the State's "*decision*" to channel trial-IAC claims to collateral proceedings—not simply the nature of the claims—that had "consequences for the State's ability to assert a procedural default in later proceedings." *Id.* (emphasis added). And petitioner concedes that *Martinez* and *Trevino* apply only to States that "*choos[e] to move* trial-ineffectiveness claims outside of the direct-appeal process." Pet. Br. 19 (emphases added) (quoting *Martinez*, 566 U.S. at 13).

Deliberate action was crucial to the Court's reasoning because the cause-and-prejudice "rules reflect an

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[10] The OCFW staff directory can be found at http://www.ocfw.texas.gov/staff-directory.aspx.

equitable judgment that *only* where a prisoner *is impeded or obstructed* in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default." *Martinez*, 566 U.S. at 13 (emphases added). Where a State channels trial-IAC claims to collateral review, the Court concluded, it is "*the State* [that] significantly diminishes prisoners' ability to file such claims." *Id.* (emphasis added). That is not true with appellate-IAC claims, which, by their nature, have never been available in proceedings in which counsel to develop such a claim is guaranteed.

Trevino did not alter this reasoning. It is true that *Trevino* "rejected the argument that the *Martinez* exception hinges on the State's formal channeling of claims to collateral proceedings." NACDL Br. 17; *accord* Pet. Br. 19-20. But *Trevino* still relied on the State's *choice*, through the "design and operation" of its "procedural framework," to make "collateral review ... the preferred—and indeed as a practical matter, the only—method for raising an ineffective-assistance-of-trial-counsel claim." *Trevino*, 133 S. Ct. at 1920-21. *Trevino* commented on "'the inherent nature of most ineffective assistance' of trial counsel 'claims,'" Pet. Br. 20 (quoting *Trevino*, 133 S. Ct. 1918), only in the context of explaining why the State's deliberate choices in the "structure, design, and operation" of its procedures "make[] it virtually impossible for appellate counsel to adequately present an ineffective assistance of trial counsel claim on direct review." *Trevino*, 133 S. Ct. at 1918, 1921 (quotation marks omitted).

Petitioner is correct that "the purpose of the *Martinez* rule is not to punish states for requiring claims to be raised in collateral proceedings but to avoid injustice to the prisoner." Pet. Br. 21. But the "injustice to the

prisoner" that concerned the Court in *Martinez* was holding the prisoner solely responsible for a default that was, in part, a result of an impediment or obstacle erected by the State. *Martinez*, 566 U.S. at 13-14. Deliberate state channeling was vital to the creation of *Martinez*'s limited exception to *Coleman*. No such impediment or obstacle exists here. Accordingly, neither does any comparable justification exist for a further exception to *Coleman* for appellate-IAC claims.

D. Additional equitable considerations show that *Martinez* should not be extended to appellate-IAC claims.

The *Martinez* exception is equitable in nature. The Court concluded that the three considerations discussed above (in Part I.A-I.C) justified an equitable exception to *Coleman* for substantial trial-IAC claims in certain jurisdictions, notwithstanding the potential costs. *Cf. Wright v. West*, 505 U.S. 277, 293 (1992) ("[T]he[] costs, as well as the countervailing benefits, must be taken into consideration in defining the scope of the writ."). As demonstrated above, those three factors do not justify extending *Martinez*'s exception to include appellate-IAC claims.

Furthermore, competing equitable considerations in this context support adherence to *Coleman*'s rule. Expanding *Martinez* to include appellate-IAC claims will consume resources, create perverse incentives, and impinge on finality and comity. Those costs are not "modest," *cf.* Pet. Br. 26, and they will accrue despite a trial court having already adjudicated the alleged trial error underlying any substantial appellate-IAC claim. It is not equitable to create such substantial costs in the face of only scant alleged benefits from extending *Martinez* to appellate-IAC claims.

1. "*Davila* claims" will become a regular part of federal habeas review.

If *Martinez* is extended to appellate-IAC claims, a "*Davila* claim" can be expected frequently in federal habeas cases for several, reinforcing reasons.

a. First, unlike *Martinez* claims, a *Davila* claim will be available in every jurisdiction. *Martinez* and *Trevino* limited their remedy to States that channeled trial-IAC claims out of the first round of direct appeal, in which effective counsel is guaranteed. Thus, those decisions did not cover a number of States. *See, e.g.*, *Lee v. Corsini*, 777 F.3d 46, 59-60 (1st Cir. 2015) (*Martinez* and *Trevino* do not apply because Massachusetts does not channel trial-IAC claims to collateral review); *Fairchild v. Trammell*, 784 F.3d 702, 721 (10th Cir. 2015) (Oklahoma); *Ramirez v. United States*, 799 F.3d 845, 851 (7th Cir. 2015) (Wisconsin); *Henness v. Bagley*, 766 F.3d 550, 557 (6th Cir. 2014) (Ohio). But appellate-IAC claims, by their very nature, can never be brought in a proceeding in which effective counsel is guaranteed. *See supra* Part I.C. Accordingly, a *Davila* claim will be available to prisoners in every State.

b. Second, there will routinely be opportunity to allege *Davila* claims requiring party and judicial scrutiny. Any issue raised at trial that appellate counsel chooses not to pursue on appeal could be alleged by a prisoner as the basis for an appellate-IAC claim. And those issues will often be abundant because it is both expected and normal that appellate counsel abandon a number of issues raised by trial counsel: "appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith*, 528 U.S. at 288; *see*

Martinez, 566 U.S. at 15 (presuming that "the attorneys appointed by the courts are qualified to perform, and do perform, according to prevailing norms").

c. Third, not only will opportunity routinely exist, but the incentives to allege appellate-IAC claims are powerful—as this case shows. The incentive is particularly strong in capital cases, where the overriding goal of petitioners is to, at the very least, delay their penalty. *See* Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal 5 (Aug. 23, 1989) ("The inmate under capital sentence, whose guilt frequently is never in question, has every incentive to delay the proceedings that must take place before that sentence is carried out.").[11] And it is easy to second-guess appellate decisions after the fact, as it is with any litigation. Thus, claims of ineffective assistance of counsel are "one of the most common forms of cause invoked." Aziz Huq, *Habeas and the Roberts Court*, 81 U. Chi. L. Rev. 519, 542 (2014) (quotation marks omitted).

Petitioner's proposed rule would further incentivize defaulted appellate-IAC claims because their new cognizability on federal habeas would also allow, in turn, assertion of appellate-IAC as *cause* to allow direct con-

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[11] *See also* Barry Latzer & James N.G. Cauthen, *Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study* 13 (Mar. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/217555.pdf ("The appeals process does not affect non-capital sentences in the same way as capital sentences. Whereas a death sentence may not be carried out while appeals are pending, a sentence of imprisonment ordinarily will run its course notwithstanding appellate review. Because appeals stay, even if temporarily, the implementation of death sentences, there is a strong incentive to file numerous and even frivolous postconviction petitions, further prolonging the appellate process.").

sideration of the underlying claim of trial error. Under current law, if a claim of trial error was not presented on appeal in state court, the prisoner cannot overcome that default due to the "cause" of ineffective appellate counsel unless that appellate-IAC assertion was itself properly presented in state court "as an independent claim." *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000) (quoting *Murray*, 477 U.S. at 489). *Edwards* held that, because "ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim," *id.* at 451, the *Coleman* bar precludes federal-court consideration of any appellate-IAC assertion—as a claim or as cause—if it was not properly presented for state-court review. *Id.* at 451-52.

If the Court were to now create an exception to *Coleman* allowing federal habeas courts to consider defaulted appellate-IAC claims, the reasoning of *Edwards* means that a defaulted appellate-IAC claim could also be entertained as cause to overcome the appellate default of a trial-error claim. That would make appellate-IAC allegations an enticing tool for prisoners trying get federal review of trial claims—which come with the remedy of a new trial, not merely a new appeal.[12]

Currently, *Coleman* provides a much-needed brake on the incentive to assert appellate IAC as cause where

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[12] Adding to this incentive, when procedural default is excused, some courts review the defaulted claim de novo notwithstanding an earlier decision on the merits. *See, e.g.*, *Barton v. Warden, S. Ohio Corr. Facility*, 786 F.3d 450, 462 (6th Cir. 2015) (per curiam), *cert. denied sub nom. Cook v. Barton*, 136 S. Ct. 1449 (2016); *Thomas v. Horn*, 570 F.3d 105, 117 (3d Cir. 2009); *Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir. 1997); *Hilton v. Dir. of the Dep't of Corr.*, No. 2:16-cv-00135, 2016 WL 8285664, at *4 (E.D. Va. Dec. 7, 2016).

it was not raised on state collateral review. If petitioner succeeds, however, that benefit will be lost. Defaulted appellate-IAC claims will be accompanied by trial-error claims. This dynamic did not exist in *Martinez*, which concerned trial-IAC claims, because trial-IAC is itself sufficient for a prisoner to obtain a new trial. *See* 7 LaFave et al., *supra*, § 28.4(d) at 258 n.75.

d. Finally, recognizing a *Davila* claim will incentivize prisoners to sandbag on state habeas and save their appellate-IAC claims for federal habeas. Under the existing *Coleman* rule, there is no benefit to holding back an appellate-IAC claim on state habeas: the default of that claim cannot be excused in federal court based on state-habeas counsel's alleged inadvertence or error. Thus, prisoners are incentivized to bring appellate-IAC claims on state habeas—where they should—and the merits rejection of appellate-IAC claims in state court will receive AEDPA deference in subsequent federal habeas petitions. *See* 28 U.S.C. § 2254(d).

In contrast, under petitioner's rule allowing federal-court review of defaulted appellate-IAC claims, a prisoner would be better served by his state-habeas counsel failing to raise an appellate-IAC claim if the counsel believes that federal court would be a better forum. That is because procedural default would not bar the claim in federal court under petitioner's rule, yet the contrived absence of a merits adjudication of that claim by the state court would preclude AEDPA deference. *See, e.g.*, Jonathan D. Soglin, First District Appellate Project Training Seminar 14 (2008) ("Practice Tip: The best scenario for federal court review may be where the state court finds the federal claim procedurally defaulted under a state procedural bar that is . . . excused . . . . In that situation, the federal court will review the claim on the merits and decide it de novo, with no deference

to the state court decision."), https://perma.cc/JNU7-AXCR. Creating a *Davila* claim will thus incentivize prisoners to sandbag in state court and channel appellate-IAC questions to federal court. This is precisely the result that the cause-and-prejudice standard seeks to avoid. *See Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977).

e. In sum, under petitioner's rule, ample opportunity and incentive will cause *Davila* claims to proliferate in federal court. Experience in the Ninth Circuit bears out that concern. Respondent's research indicates that the Ninth Circuit's decision in late 2013 holding that *Martinez* extends to appellate-IAC claims, *Nguyen*, 736 F.3d 1287, has already been used by petitioners in dozens of appellate-IAC habeas cases.[13] And that is the consequence of just one outlier decision of a circuit-court panel. A decision of this Court would affect practice much more extensively. For example, after this

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[13] *See, e.g.*, *Hawes v. Palmer*, No. 3:10-cv-00655, 2017 WL 663235, at *3 (D. Nev. Feb. 16, 2017); *Ramet v. Legrande*, No. 3:14-cv-00452, 2016 WL 4770030, at *4 (D. Nev. Sept. 12, 2016); *Husband v. Ryan*, No. 13-cv-01320, 2016 WL 5799039, at *5 (D. Ariz. June 21, 2016), *report and recommendation adopted*, 2016 WL 5682747 (D. Ariz. Sept. 30, 2016); *Miller v. Baldwin*, No. 3:96-cv-00114, 2016 WL 3951394, at *23 (D. Or. Apr. 7, 2016), *report and recommendation adopted*, 2016 WL 3951408 (D. Or. July 19, 2016); *Dixon v. Ryan*, No. 14-cv-00258, 2016 WL 1045355, at *41-44 (D. Ariz. Mar. 16, 2016); *Speight v. Warner*, 159 F. Supp. 3d 1218, 1220-29 (W.D. Wash. 2016); *Chavez v. LeGrand*, No. 3:13-cv-00548, 2015 WL 5567284, at *4 (D. Nev. Sept. 22, 2015); *Pinzon v. Ryan*, No. 14-cv-08244, 2015 WL 11071468, at *10 (D. Ariz. Sept. 22, 2015), *report and recommendation adopted*, 2016 WL 3387269 (D. Ariz. June 20, 2016); *Jaffe v. Brown*, No. 05-cv-04439, 2014 WL 2938275, at *7 (N.D. Cal. June 27, 2014); *see also Vanderschuit v. Ryan*, No. 15-cv-00915, 2016 WL 7383785, at *4 n.5 (D. Ariz. Dec. 21, 2016).

Court's *Martinez* decision, *Martinez* claims are now routine in federal habeas litigation. By respondent's count, *Martinez* has so far been cited in over 3,800 federal cases. If petitioner's position here is accepted, *Davila* claims would similarly flood federal courts.

2. The proliferation of *Davila* claims will impose significant costs and harm important interests in finality and comity.

Swamping federal courts with *Davila* claims would not advance any of the considerations animating *Martinez*, *see supra* Part I.A-I.C, and would only impose significant costs and impair state and federal interests in finality and comity.

a. Making *Davila* claims a regular part of habeas practice will put a significant strain on state resources. After all, "most of the price paid for federal review of state prisoner claims is paid by the State." *Coleman*, 501 U.S. at 738-39. This is true in capital cases in particular: "This delay undermines the deterrent effect of capital punishment and reduces public confidence in the criminal justice system." Lewis F. Powell, Jr., *Capital Punishment*, 102 Harv. L. Rev. 1035, 1035 (1989).

This Court has recognized that evaluating alleged cause for procedural default based on purported attorney error is a particularly costly exercise:

> In order to determine whether there was cause for a procedural default, federal habeas courts would routinely be required to hold evidentiary hearings to determine what prompted counsel's failure to raise the claim in question. While the federal habeas courts would no doubt strive to minimize the burdens to all concerned through the use of affidavits or other simplifying procedures, [one cannot] assume that these costs

> would be negligible, particularly since, as [the Court] observed in *Strickland* . . . , "[i]ntensive scrutiny of counsel . . . could dampen the ardor and impair the independence of . . . counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."

Murray, 477 U.S. at 487-88.

Federal courts bear this burden as well. In 2015, habeas petitions under 28 U.S.C. § 2254 accounted for one out of every fifteen private civil cases filed in federal courts. Admin. Office of the U.S. Courts, 2015 Judicial Business of the United States Courts tbl. C-3 (2016), http://www.uscourts.gov/sites/default/files/data_tables/C03Sep15.pdf. In Texas, that statistic jumps to one in ten. *Id.* And, even a few years before *Martinez*, capital habeas petitions took "twice as long to complete in the federal courts" as they did at the time of AEDPA's enactment. Jon B. Gould, *Justice Delayed or Justice Denied?: A Contemporary Review of Capital Habeas Corpus*, 29 Justice Sys. J. 273, 273 (2008).

Courts must be sensitive to the "heavy burden" that "[f]ederal collateral litigation places . . . on scarce federal judicial resources, . . . threaten[ing] the capacity of the system to resolve primary disputes." *McCleskey*, 499 U.S. at 491. The strain on federal courts that will accompany a victory for petitioner counsels against expanding *Martinez*'s narrow exception to *Coleman*.

b. The increase in litigation if petitioner prevails will not be limited to *Davila* claims; a stream of litigation seeking further exceptions to *Coleman* can be expected. *Martinez* was not blind to the comparable danger there; hence, the Court used specific and clear limiting language. Retreating from that language here will

undermine any further effort to limit exceptions to *Coleman* and other procedural rules.

This is not idle speculation. *See, e.g.*, *Hunton*, 732 F.3d at 1127-31 (Fletcher, J., dissenting) (arguing that claims beyond ineffective assistance of counsel should be excepted from *Coleman*'s rule); 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 26.3[b] at 1590-91 n.36 (7th ed. 2016) (arguing that the reasoning of *Martinez* should remove *Coleman*'s bar in all manner of new scenarios, such as defaulted *Brady* claims, defaulted trial-IAC claims in States that do not channel such claims to collateral proceedings, and where the purported "cause" of a default is ineffective assistance of counsel in proceedings subsequent to initial collateral review);[14] Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After* Martinez *and* Pinholster, 41 Hofstra L. Rev. 591, 595-97 (2013) (arguing that *Martinez*'s reasoning undermines the bar on second-and-successive petitions and should allow new factual development in federal court).

The costs and delays from this avalanche of expected litigation only confirm the undesirability of cutting back on *Coleman* here.

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[14] Petitioner relies on the Hertz and Liebman treatise for various propositions. Pet. Br. 16-17. The authors of that treatise, however, take an unduly aggressive stance in favor of expanding federal review of state convictions compared to other secondary sources. *Cf., e.g.*, 2 Hertz & Liebman, *supra*, § 26.3[b] at 1584-85 (advocating for a constitutional right to effective state collateral counsel); James Liebman & Randy Hertz, Brecht v. Abrahamson: *Harmful Error in Habeas Corpus Law*, 84 J. Crim. L. & Criminology 1109, 1113 (1994) (bemoaning this Court's decision in *Brecht* as "an assault on the principle of direct appeal/habeas corpus parity").

c. Traditional concerns of finality and comity likewise counsel against any further exception to *Coleman*. "[T]he doctrine[] of procedural default" is "designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time;" it also "seek[s] to vindicate the State's interest in the finality of its criminal judgments." *McCleskey*, 499 U.S. at 493.

These traditional interests are all the more powerful after Congress endorsed them in AEDPA. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011) (highlighting "AEDPA's goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review a claim, and to correct any constitutional violation in the first instance.") (quotation and alteration marks omitted); *Day v. McDonough*, 547 U.S. 198, 208 (2006) ("[C]onsiderations of comity, finality, and the expeditious handling of habeas proceedings . . . motivated AEDPA."); *Duncan v. Walker*, 533 U.S. 167, 181 (2001) ("AEDPA's clear purpose [is] to encourage litigants to pursue claims in state court prior to seeking federal collateral review").

Recognizing an additional exception to *Coleman* in this case will "undermine[] the usual principles of finality of litigation," "degrade[] the prominence of the trial itself," and "impose[] special costs on our federal system." *Engle*, 456 U.S. at 126-28. These costs imposed on our federal system by the availability of the writ for state prisoners "are particularly high when a . . . default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts," thereby depriving state courts of the "chance to mend their own fences and avoid federal intrusion." *Id.* at 128-29; *accord Coleman*, 501 U.S. at 729-32.

In short, a victory for petitioner can be expected to flood the federal courts with claims that will undermine state procedural rules. This "significant harm," *Coleman*, 501 U.S. at 750, is not justified—especially when none of the three reasons animating *Martinez* apply to appellate-IAC claims, *see supra* Part I.A-I.C.

II. Alternatively, the Court Should Affirm the Fifth Circuit's Denial of Petitioner's Request for a COA Because Petitioner's Appellate-IAC Claim Is Undebatably Meritless.

Petitioner's appellate-IAC claim is based on his appellate counsel's decision not to raise an *unpreserved* challenge to a *correct* jury instruction where petitioner *confessed* to the facts constituting capital murder. No reasonable jurist would find any merit in petitioner's appellate-IAC claim. *See* Br. in Opp. 15-21. This alternative reason requires affirmance of the Fifth Cicuit's denial of petitioner's request for a COA, even if this Court were inclined to expand *Martinez*'s exception to cover appellate-IAC claims. And the Court may dispose of the case on the basis that the appellate-IAC claim is without merit, rather than address whether a procedural-default bar applies. *See Engle*, 456 U.S. at 119-21 & n.19 (where a claim is "without merit," "[i]t is unnecessary in such a situation to inquire whether the prisoner preserved his claim before the state courts").

To obtain a COA, it must be "debatable among jurists of reason" that petitioner's appellate-IAC claim would prevail on the merits. *Miller-El v. Cockrell*, 537 U.S. 322, 330 (2003). And, to succeed on an appellate-IAC claim, a prisoner must show that appellate counsel was deficient and that this deficiency prejudiced him.

Smith, 528 U.S. at 285-86. Both elements of an appellate-IAC claim are undebatably lacking here.

A. No reasonable jurist would find appellate counsel's performance here deficient, as the purported trial error was nonexistent and unpreserved.

It is beyond reasonable debate that petitioner's appellate counsel was not constitutionally deficient by failing to challenge the substance of the transferred-intent instruction. That argument was not preserved by trial counsel; the instruction was a correct, verbatim recitation of the relevant statute; and the instruction would not have erased the overwhelming evidence of petitioner's guilt.

"Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009) (quotation marks omitted). Always difficult to overcome, that presumption is particularly demanding when the claim is that counsel failed to raise a particular issue on appeal. *See* Pet. Br. 27. "[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith*, 528 U.S. at 288; *accord Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). It is "only when ignored issues are clearly stronger than those presented" that "the presumption of effective assistance of counsel [can] be overcome." *Smith*, 528 U.S. at 288 (quotation marks omitted).

Petitioner complains that his appellate counsel failed to argue that the transferred-intent instruction was

erroneous, insisting that this argument was the strongest available on appeal. Pet. Br. 28. But, as noted above, petitioner's trial counsel did not object to the substance of the instruction and thus failed to preserve that argument for appeal. *See supra* pp. 5-6; *see also Pennington*, 697 S.W.2d at 390 (explaining that to preserve an objection to a jury instruction, "the accused is required to distinctly specify each ground of objection"). So any challenge on appeal to the substance of that instruction would have been reviewed under a demanding standard: it must be "so egregious" that it denied petitioner "a fair and impartial trial." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (quotation marks omitted).

The arguments that were raised by petitioner on appeal—such as the challenges to the admission of his confession, which was the crux of the prosecution's case—did not face such an "exacting" burden. *Jones v. State*, 720 S.W.2d 535, 536 (Tex. Crim. App. 1986). That point belies any thought that an instructional challenge was "clearly stronger" than the arguments actually made on appeal. *Smith*, 528 U.S. at 288. In fact, many of the arguments raised on appeal were repeated in petitioner's current federal habeas petition. *See supra* p. 9. Petitioner's unpreserved jury-instruction argument would have been one of the weakest on appeal and certainly not the strongest.

In all events, because the transferred-intent instruction was proper, declining to challenge it could not have been deficient performance by trial or appellate counsel. Petitioner does not contend that the instruction failed to accurately recite the governing statute—as it quoted the relevant statute verbatim. *See supra* pp. 4-5. Instead, petitioner incorrectly contends that the instruction was infirm because it allegedly permitted

the jury to use petitioner's intent to kill one person to satisfy the mental-state element with respect to the two deaths that he caused. Pet. Br. 6-7.[15] But the instruction addressed culpability when the intent to harm one "person," in the singular, results in harm to a different "person," in the singular. J.A. 62. This single-victim-focused instruction did not permit "the double use of a single specific intent to elevate two homicidal results" into two murders. *Roberts*, 273 S.W.3d at 333 (Price, J., concurring).

Contrary to petitioner's statement, respondent has indeed argued "that appellate counsel had a strategic reason for not challenging the jury instructions." Pet. Br. 8. As respondent's brief in opposition to certiorari stated: "Understandably, defense trial counsel did not lodge an objection to the supplemental charge on the basis that it was an incorrect statement of the law. Appellate counsel cannot be ineffective for failing to raise a claim of error that was not preserved for appeal and was not erroneous." Br. in Opp. 19 (citation omitted); *see also* Br. in Opp. 14, 17.

Not only was the instruction both correct and far from the strongest issue on appeal, but the jury heard overwhelming evidence of petitioner's intent to murder multiple people and evidence supporting the alternative "knowing" mental-state for capital murder. Petitioner, who shot up a group of people with a semi-automatic

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[15] Petitioner's insistence that the jury's note evinces its belief that petitioner intended to kill only one person despite his confession to intending to shoot at least four persons, Pet. Br. 6-7, is meritless. The only plausible interpretation of the note is that the jury was seeking clarification as to whether the specific identities of petitioner's victims mattered.

rifle, was clearly guilty of this alternative form of capital murder. *See infra* Part II.B.

B. No reasonable jurist would find prejudice because the unpreserved objection had no merit and no serious question of petitioner's guilt exists.

Nor is it reasonably debatable that petitioner could satisfy the prejudice prong of his appellate-IAC claim. To reverse the denial of a COA, this Court would need to find it at least reasonably debatable that a direct-appeal challenge to the trial court's transferred-intent instruction would have been successful. But petitioner could not have overcome the Court of Criminal Appeals' "egregious harm" standard for unpreserved arguments, even if there were something wrong with the trial court's supplemental instruction.

When overwhelming evidence supports a verdict, the Court of Criminal Appeals will not find egregious harm warranting reversal. *See, e.g.*, *Neal v. State*, 256 S.W.3d 264, 278-79 (Tex. Crim. App. 2008); *Bonfanti v. State*, 686 S.W.2d 149, 153 (Tex. Crim. App. 1985); *see also Sanchez v. State*, 376 S.W.3d 767, 776 (Tex. Crim. App. 2012) (concluding that instructional error was harmless because the evidence of defendant's guilt was overwhelming). In *Neal*, for example, the defendant complained that the trial court's instruction allowed the jury to convict him of murder even if it concluded that his alleged accomplice had acted alone. 256 S.W.3d at 278. The court explained, "[e]ven assuming arguendo that the jury instruction was erroneous . . . , any such error would not have risen to the level of egregious harm" because "the evidence of appellant's guilt was overwhelming." *Id.* at 278-79.

The same is true here even assuming arguendo that the jury instruction was erroneous. The jury convicted petitioner of capital murder based on his "shoot 'em up" of a child's birthday party attended by more than 15 people. J.A. 37. There is no question that petitioner killed multiple people. And petitioner *confessed* to intending to shoot more than two people:

> I had a scope on my gun, so I had range. I stood in the field across the street. The fat dude [Jerry Stevenson] was in the middle of the street. The other three were on the porch. I wasn't going to give them a chance to get a gun. . . . I only let off 10 rounds, and I had 21 in the clip. I was trying to get the guys on the porch, and I was trying to get the fat dude.

J.A. 38.

Even apart from petitioner's confession to intending to kill multiple people, petitioner's actions are overwhelming proof that he committed the knowing form of capital murder. It is beyond peradventure that spraying bullets at a crowd of more than 15 people with a rifle was reasonably certain to kill more than one person. *See, e.g.*, *Medina v. State*, 7 S.W.3d 633, 636-38 (Tex. Crim. App. 1999).

It is not debatable that the Court of Criminal Appeals would find overwhelming evidence that petitioner was guilty of capital murder.[16] That would

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[16] Petitioner's purported "[s]ubstantial evidence" to the contrary, Pet. Br. 4-5, is nothing of the sort. It does not address at all petitioner's confession to intending to shoot four people or the undisputed inference that, when petitioner opened fire on a group of more than 15 people, he was reasonably certain to kill two or more of them. Moreover, petitioner's description of the "evidence" is not accurate. The "motive offered" by the State, Pet. Br. 4, was not just that petitioner had a dispute with Jerry

foreclose any appellate relief on egregious-error review. Petitioner's appellate-IAC claim is thus meritless beyond any reasonable debate.

CONCLUSION

The order of the court of appeals denying a COA should be affirmed.

Respectfully submitted.

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Stevenson, but that, in petitioner's own words, he wanted to shoot members of a rival gang, J.A. 37. And although a witness did at one point "testif[y] that the red beam from the laser sight on Davila's rifle shined on Jerry Stevenson but not on the women or children outside," Pet. Br. 4 (incorrectly citing R.5638), that same witness later corrected himself and testified that he saw the "beam on the grandmother [Annette Stevenson]" and other "people in the front of the house[.]" R.5715-16; *cf.* R.5707 (earlier uncorrected testimony). Finally, petitioner's "poor vision," Pet. Br. 5, does not help him; when he took aim, he thought he was shooting at four men. J.A. 37-38. Thus, he had the mental state for capital murder. *See supra* pp. 4, 8, 10.

RECORD AND BRIEFS

No. 16-6219

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In The
Supreme Court of the United States

ERICK DANIEL DAVILA,

Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR PETITIONER

In this context, there is no principled distinction between ineffective assistance of trial and appellate counsel claims. The reasoning of *Martinez* applies directly to the issue before the Court.

The State argues that the right to effective assistance of counsel is a secondary, conditional right; that *Martinez* should not apply to appellate counsel claims because they, by their very nature, must be raised in collateral proceedings; and that the trial court has already ruled on the claims.

The State is incorrect. The right to counsel on a direct appeal is firmly established, and, like the right to effective assistance of counsel at trial, applies to the States from the intersection of the Sixth and Fourteenth Amendments. Both rights are necessary to protect vital interest of the accused.

As this Court recognized in *Trevino*, the essence of the *Martinez* rule is that the underlying ineffectiveness claim must be raised during initial-review collateral proceedings to avoid procedural default. It is irrelevant whether, as in *Martinez*, the State "channeled" ineffective assistance claims into collateral proceedings or whether, as in *Trevino*, the State fails to overcome "the inherent nature of most ineffective assistance" claims that require them to be raised on collateral review. *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (quoting *Ex parte Torres*, 943 S.W.2d 469, 475 (1997) (en banc).

The State misreads *Martinez* by treating the claim as the underlying trial error, not the ineffective assistance. If a claim of ineffective assistance of appellate counsel is procedurally defaulted in an initial-review collateral proceeding, no court will address that claim on the merits.

The rule sought by Davila will not lead to the consequences predicted by the State. Davila asks only that *Martinez* apply to ineffective assistance of counsel claims and only to default of such claims because of ineffective assistance in the initial-review collateral proceeding. Such a ruling will be unlikely to increase the number of federal habeas petitions filed, and insubstantial claims of ineffective appellate counsel can be efficiently dealt with by federal courts.

Finally, the State's merits analysis is flawed. Under Texas criminal law, charge error can never be forfeited. The instructions did not capture Texas' prohibition on double-transferred intent. Davila properly objected, so his case would have been reversed if the instruction caused any harm, in any degree. But even if Davila had not objected, Davila would still have been entitled to a new trial under the "egregious harm" standard because the erroneous jury instruction vitally affected his defense theory and relieved the State of its burden to prove an element of the offense.

I. The State Has Not Identified a Principled Distinction Between Ineffective Assistance of Trial and Appellate Counsel.

As Davila explained in his opening brief (at 18-26), for these purposes, there is no principled distinction between ineffective assistance of trial counsel and appellate counsel.

A. Assistance of counsel on direct appeal is no less important than assistance of counsel at trial.

The State is incorrect that assistance of appellate counsel is a second-class right, less important than the right to effective assistance of counsel at trial. State Brief at 21-27.

Both the right to counsel at trial and the right to counsel on appeal apply to the States through the Due Process Clause of the Fourteenth Amendment. *Gideon* rests on the recognition that a "fair system of justice" requires the appointment of counsel: "[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963).

When a State, as Texas has done, makes appellate review "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956), defendants have the right to the effective assistance of counsel on direct appeal.

Although, as the State notes (at 26-27), *Ross* v. *Moffitt*, 417 U.S. 600 (1974), identified some differences between the trial and appellate stages of a criminal proceeding (at least the discretionary appellate stages), the later decision in *Evitts* v. *Lucey*, 469 U.S. 387 (1985), firmly grounded the right to effective assistance of counsel on appeal in the same due process concerns as *Gideon*: "[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Id.* at 392. Without assistance of an attorney, the right to a direct appeal is no more than a "meaningless ritual." *Id.* at 394 (quoting *Douglas* v. *California*, 372 U.S. 353, 358 (1963)).[1]

In *Evitts*, this Court also recognized that effective counsel was necessary at both trial and during direct appeal in order "to protect the vital interests at stake." 469 U.S. at 396. Further, the failure to comply with Due Process during the direct appellate process renders "the subsequent judgments against the petitioners unconstitutional." *Id.* at 397.

And while it is true that the Court has previously stated that due process of law does not require direct appeals in criminal proceedings, *McKane v. Durston*, 153 U.S. 684, 687 (1894), all States currently provide for direct appeals. *E.g.*, Harlon Leigh Dalton, *Taking*

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[1] In *Moffitt*, this Court declined to extend the right to counsel to discretionary appeals beyond a first appeal of right partly because the petitioner's claim "had 'once been presented by a lawyer and passed upon by an appellate court.'" *Moffitt*, 417 U.S. at 614.

the Right To Appeal (More or Less) Seriously, 95 YALE L.J. 62, 62 & n.2 (1985).

Difficult constitutional questions would certainly arise if a State were to abolish direct appeals in capital cases. In all three of the 1976 cases upholding capital punishment schemes, the plurality noted with approval the provisions for direct appellate review as critical to the validity of each State's new capital punishment framework. *See Gregg* v. *Georgia*, 428 U.S. 153, 198 (1976) (plurality op.) (noting that "meaningful appellate review" was a "further safeguard" against arbitrary death sentences); *Proffitt* v. *Florida*, 428 U.S. 242, 258-59 (1976) (plurality op.) ("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases."); *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (plurality op.) (noting Texas' "prompt judicial review of the jury's decision in a court with statewide jurisdiction").

In the years since *Gregg*, *Profitt*, and *Jurek*, this Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker* v. *Dugger*, 498 U.S. 308, 321-23 (1991). It is doubtful that the Eighth Amendment would permit the imposition of capital sentences with no direct appellate review.

But the question is moot because all States provide for direct appeals. Trials continue to be the "main event" (where a defendant's guilt or innocence is

determined), but the States recognize that to accurately adjudicate guilt, trials must follow the rules. Regardless whether direct appeals are required, the Court has recognized that where a State provides for appeals, the right to appellant counsel is important "to assure that only those who are validly convicted have their freedom drastically curtailed." *Evitts*, 469 U.S. at 399.

Indeed, this Court has recognized that "[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." *Griffin*, 351 U.S. at 18. The *Griffin* Court also noted that every state provided "some method of appeal from criminal convictions" and that "[s]tatistics show that a substantial proportion of criminal convictions are reversed by state appellate courts." *Id.* at 18-19. The appellate process was therefore a necessary tool to ensure that defendants did not "lose their life, liberty or property because of unjust convictions which appellate courts would set aside." *Id.*

As noted by the *amici* supporting the Petitioner, the direct appellate process is just as important a tool in correcting invalid convictions today as it was 60 years ago. Amicus Br. of NACDL and ACLU at 8.

For a trial to serve its proper role in adjudicating guilt and innocence, rules of procedure and evidence

must be followed, and juries must be properly instructed. Appellate lawyers are vital to protecting these rights, and the right to effective assistance of appellate counsel is no less important than the right to effective assistance of trial counsel.

Teague v. *Lane*, 489 U.S. 288 (1989), involves a fundamentally different context. *Teague*'s "watershed rule" exception is "extremely narrow," *Whorton* v. *Bockting*, 549 U.S. 406, 417 (2007), because overcoming the bar on retroactivity means that a court must reconsider a criminal conviction that had no constitutional error at the time it became final. *See Teague*, 489 U.S. at 311. By contrast, Davila seeks to challenge his conviction based on a constitutional error that was established as an error at the time of the conviction.

The same equitable considerations that led the Court in *Martinez* to permit ineffective assistance in an initial-review collateral proceeding to excuse the procedural default of a substantial claim of ineffective assistance of trial counsel should lead to the same result for substantial claims of ineffective assistance of appellate counsel.

B. Claims of ineffective assistance of both trial and appellate counsel must, by their nature, be raised in collateral proceedings.

As Davila anticipated, the State emphasizes (at 28-32) that it has not "channeled" ineffective assistance of appellate counsel claims into collateral review

proceedings. Instead, such claims must inherently be raised on collateral review.

But as this Court recognized in *Trevino*, "'the inherent nature of most ineffective assistance' of trial counsel 'claims'" requires them to be raised on direct appeal. *See Trevino*, 133 S. Ct. at 1918 (quoting *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (en banc)). Texas has not "deliberately" and formally precluded defendants from raising ineffective assistance of trial counsel on direct appeal. But nonetheless, Texas's procedures, and the nature of ineffective-assistance claims, inherently required that the claims be raised in a collateral proceeding.

What is important in both *Martinez* and *Trevino* is that the initial-review collateral proceeding was the first place where an important constitutional claim could be raised. In this context, the initial-review collateral proceeding is tantamount to a direct appeal: this is the first opportunity to raise the claim, the petitioner will not have a prior brief or judicial decision addressing the claim, and it will be nearly impossible for a petitioner to present the claim without competent counsel.

This Court has historically relied upon its equitable power to ensure that important federal constitutional claims are reviewed by the federal courts. *See Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (recognizing the "importance of the Great Writ" and that "a strong equitable claim would ordinarily keep [federal courthouse doors] open."); *Maples* v. *Thomas*, 565 U.S.

266, 292 (2012) (Alito, J., concurring) (agreeing that petitioner had established cause and prejudice although the cause was not "a predictable consequence of the [state's] system.").

The reasoning in *Trevino* is consistent with the equitable nature of the exception drawn by the Court. Prisoners whose claims of ineffective assistance of trial or appellate counsel are forfeited at initial-review collateral proceedings are in the same position, regardless of why those claims must be raised in the initial-review collateral proceeding. If, as *Martinez* held, the failure to receive effective assistance of counsel in an initial-review collateral proceeding can excuse the procedural default of ineffective trial counsel claims, there is no reason it should not excuse the procedural default of ineffective appellate counsel claims.

C. Under the State's rule, meritorious claims of ineffective assistance of appellate counsel would never be reviewed by any court.

And like a claim of ineffective assistance of trial counsel, if a claim of ineffective assistance of appellate counsel is forfeited at an initial-review collateral proceeding, then no court will ever address the claim on the merits.

In *Martinez*, this Court explained that "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." 566 U.S. at 10. That is, no state court

at any level will hear the claim of ineffective assistance of counsel, not a claim of some underlying trial error. *Id.* Similarly, both *Trevino*'s majority and dissenting opinions focused on the ineffective assistance claims: "*Martinez* argued that his lawyer should have raised, but did not raise, his claim of ineffective assistance of trial counsel during state collateral review proceedings." 133 S.Ct. 1911, 1917 (2013); *see also id.* at 1922 (Roberts, C.J., dissenting) (explaining that in *Martinez*, defendants "could *only* raise such claims [of ineffective assistance] in state collateral proceedings" (emphasis in original)).

The State argues that Davila's argument about the jury instructions was already heard by the trial court.[2]

But errors of state law at trial do not provide grounds for relief in a federal habeas proceeding. Davila could not assert the error in his jury instructions as a claim in this federal habeas proceeding. Instead, Davila's federal claim is that he received ineffective assistance of counsel in his direct appeal, in violation of Due Process and Equal Protection. *Evitts*, 469 U.S. at 399.

Absent the application of *Martinez*, this claim was forfeited when it was not raised in his initial-review

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[2] The State simultaneously argues that Davila's argument was unpreserved and not heard by the trial court. State Br. at 43.

collateral proceeding. And unless the ineffective assistance of counsel excuses the procedural default, no court will hear the claim on the merits.[3]

For these purposes, there is no meaningful difference between these claims. The same reasoning underlying the Court's holding in *Martinez*, that claims of ineffective assistance in an initial-review collateral proceeding can excuse the procedural default of a substantial claim of ineffective assistance of trial counsel, should lead the Court to apply the *Martinez* rule to ineffective assistance of appellate counsel claims.

II. Practical Concerns Do Not Justify Distinguishing Between Ineffective Assistance of Trial and Appellate Counsel.

The State overstates the practical consequences of a holding in favor of *Davila*, which will not impose the costs the State hypothesizes. *Martinez* has already considered the costs to the State of finality, delay, and expense, and it found those costs outweighed by the equitable considerations discussed above. Since those equitable considerations apply with equal force here, the balance comes out the same. And any costs are inherently limited by the fact that *Martinez* applies only

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[3] In this case, the district court made an alternative merits finding. JA.366-68. The judgment of the Fifth Circuit cannot be affirmed on this basis because it rests entirely on the procedural default. JA.400; 413. And there is no reason to believe that in the ordinary case, district courts would address the merits of procedurally defaulted claims.

to substantial claims and only to attorney error in initial-review collateral proceedings. In other words, Davila's urged application will not increase the number of federal habeas corpus petitions, but only potentially increase the number of claims within those petitions. The subsequent writ bar will continue to prevent subsequent petitions and will prevent prisoners from asserting defaulted ineffective assistance of appellate counsel claims outside of their first federal petition. *See* 28 U.S.C. § 2244. And even if there were an increase in the number of ineffective appellate counsel claims presented, the federal courts will be able to easily and efficiently weed out insubstantial claims.

Finally, the State is incorrect that extending *Martinez* will encourage sandbagging. Not only do attorneys have an ethical duty to zealously represent their clients at all stages, but there is no benefit to omitting a winning claim from state habeas review. To do so would only make obtaining relief more difficult. Instead, the modest extension sought by Davila will enable federal courts to remedy unlawful convictions which remain only because the prisoner had ineffective appellate and habeas counsel.

A. Applying *Martinez* in these circumstances will not, necessarily, require *Martinez* to apply to other claims.

The State suggests that treating ineffective assistance of trial and appellate counsel the same will, necessarily, lead to the application of *Martinez* to other claims as well. *See* State Br. at 39-40. This is incorrect.

Martinez rested, in part, on the particular necessity for the assistance of counsel in vindicating claims of ineffective assistance of counsel. *See Martinez* v. *Ryan*, 566 U.S. 1, 12 (2012) ("Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim.").

As Davila explained (at 14-16), this rationale applies to ineffective assistance of appellate counsel at least as much – and perhaps even more – than to ineffective assistance of trial counsel. But it would not, necessarily, apply to other claims listed by the State. The issue is not before the Court now, but the balance struck by this Court in *Martinez* concerns only claims of ineffective assistance. In a future case, this Court could draw a principled distinction, for purposes of *Martinez*, between ineffective assistance of counsel and other claims, if it were to conclude that the vindication of other claims does not require the assistance of counsel to the same degree.

Nor would the limited extension of *Martinez* to ineffective assistance of appellate counsel claims permit

petitioners to prove cause and prejudice based on attorney errors occurring outside of initial-review collateral proceedings. *Martinez* specifically limited its holding to errors in such proceedings because initial-review collateral proceedings are the equivalent of a direct appeal for ineffectiveness claims. Davila does not ask this Court to change the distinction between attorney error in initial-review collateral proceedings and any other subsequent proceedings.

B. The State overstates the practical consequences of applying *Martinez* to ineffective assistance of appellate counsel.

The State predicts that applying *Martinez* to claims of ineffective assistance of appellate counsel will overwhelm the federal courts, but it offers only speculation in support.

As an initial matter, applying *Martinez* to claims of ineffective assistance of appellate counsel is unlikely to increase the number of federal habeas petitions. At most, it would lead to the assertion of an additional claim of ineffective assistance of appellate counsel within a petition. Nor will the extension of *Martinez* affect the subsequent writ bar. 28 U.S.C. § 2244(b).

Ineffective appellate counsel claims submitted in successive habeas petitions which had already been presented will continue to be dismissed, claims submitted when the default at issue did not occur in the initial-review collateral proceeding will continue to be dismissed, and claims not previously presented will

continue to be dismissed because Davila does not request a "new rule of constitutional law." 28 U.S.C. § 2244(b).

Statistics show that ineffective assistance of appellate counsel claims are rarely asserted in habeas proceedings. One study indicates that although 81% of habeas petitions in capital cases raised at least one claim of ineffective assistance of counsel, only 31% alleged ineffective assistance of appellate counsel. In non-capital habeas petitions, only 20% of the petitioners alleged ineffective assistance of appellate counsel. N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts 45-49 (2007).

And insubstantial claims of ineffective assistance of counsel can be readily identified by the district courts. Unlike ineffective assistance of trial counsel, ineffective assistance of appellate counsel will, usually, be based entirely on legal arguments and the record. District courts are well equipped to evaluate the strength of arguments and can readily recognize insubstantial claims. If a petitioner argues, like Davila, that counsel on direct appeal filed a brief but omitted an issue, then district court could determine that a claim was insubstantial by concluding either that (1) the issue omitted was not meritorious or (2) not "clearly stronger" than those issues raised in the brief.

Only if the omitted claim survived both of these hurdles might it be necessary, as the State argues, to "hold evidentiary hearings to determine what

prompted counsel's failure to raise the claim in question." State Br. at 38-39.

The State's arguments could also have been raised against *Martinez* itself, where this Court recognized that the holding "ought not to put a significant strain on state resources." 566 U.S. at 15. The Court's reasoning applies straightforwardly to this case.

Finally, the State's theory that counsel in state habeas proceedings will – intentionally – provide ineffective assistance in order to reserve ineffective assistance of appellate counsel claims for federal habeas is difficult to understand. As an initial matter, the same argument could be made about *Martinez* itself. And putting aside the ethical obligations of attorneys (and the personal consequences to an attorney of a court finding that the attorney provided ineffective assistance), there is no strategic benefit to this approach. On federal habeas, merely overcoming the procedural default of an ineffective assistance claim requires demonstrating both the substantiality of that claim and that counsel in the initial-review collateral proceeding was ineffective for not raising it. A prisoner whose attorney properly asserts the claim in an initial-review collateral proceeding does not need to surmount these additional hurdles. The *Martinez* rule is an act of grace – an equitable exception to permit prisoners to have claims heard on the merits when they would otherwise be forfeited because of their attorneys' mistakes – not some type of tactical ploy.

C. AEDPA supports Davila.

The State argues that AEDPA supports the state by embracing traditional concerns of finality and comity. State Br. at 41.

But, as this Court recognized in *Holland* v. *Florida*, AEDPA supports this Court's exercise of equitable discretion to excuse procedural default. "The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion." *Martinez*, 566 U.S. at 13. These rules are rooted in this Court's equitable powers, which have historically guided habeas corpus jurisprudence. *Ibid.* This Court has "traditionally 'governed' the substantive law of habeas corpus," and does "not construe a statute to displace courts' traditional equitable authority absent the 'clearest command.'" *Holland* v. *Florida*, 560 U.S. at 646. This Court's equitable authority to determine the cause and prejudice standard was "further reinforced by the fact that Congress enacted AEDPA after this Court" had held that it would apply equitable principles to the substantive law of habeas corpus. *Ibid.*

D. While the costs associated with applying *Martinez* are modest, the benefits are not.

The State argues that the costs associated with the application of *Martinez* outweigh what he believes are "only scant alleged benefits." State Br. at 32. Davila has shown that the costs associated with the extension

are modest, but the benefits will be existential to petitioners who will otherwise be executed, despite meritorious claims that would have resulted in a new trial had they been presented on direct appeal.

The *Carpenter* case cited by the State (at 34-35) confirms the need for application of *Martinez* to claims of ineffective assistance of appellate counsel. In *Carpenter* both the district court and the Sixth Circuit believed Carpenter had been convicted and sentenced based upon constitutionally insufficient evidence. *Edwards* v. *Carpenter*, 529 U.S. 446, 449-50 (2000). The issue was overlooked by his direct appellate counsel, and Carpenter failed to raise the issue in his *pro se* request for postconviction relief. *Ibid.* Carpenter attempted to raise the claim in a failed bid to reopen his direct appeal, but the state court refused to address the issue. *Ibid.*

Recognizing that "ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim," this Court held that ineffective assistance of appellate counsel could not be used to establish cause unless the ineffective assistance claim had been properly raised before the state court. *Id.* at 452-53.

In *Carpenter*, the prisoner did not argue to this Court that the procedural default of his claim of ineffective assistance of appellate counsel should be excused. *See id.* at 453 ("[W]e should note that

respondent has not argued that he can [show cause-and-prejudice to excuse the default], preferring instead to argue that he does not have to[.]").

The result was that a man, apparently convicted on insufficient evidence, lost his ability to challenge his illegal conviction and sentence because he was provided ineffective assistance of appellate counsel and was not provided counsel during his initial-review collateral proceeding. *Carpenter* confirms the importance of the equitable holding urged by Davila. The State may consider this a "modest" benefit, but to defendants like Carpenter and Davila, facing lengthy prison sentences and execution based on convictions at trials that were infected with error, the benefits are far from modest.

III. The State's Arguments Regarding the Merits of Davila's Claim Are Incorrect and Only Confirm the Ineffectiveness of Davila's Direct Appellate Counsel.

Finally, the State addresses the merits of Davila's claim of ineffective assistance of appellate counsel and the underlying error in the jury instructions.

There is no reason to address the issues, which turn on state law. The proper disposition is the same as in *Martinez*: adoption of the rule urged by Davila and remand to the court of appeals to determine "whether [Davila's] attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of [appellate] counsel is substantial."

Martinez, 566 U.S. at 18; *see also McLane Co.* v. *EEOC*, No. 15-1248, slip op. at 11 (Feb. 21, 2017) ("[W]e are a court of review, not of first view[.]" (quoting *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n.7 (2005)).

Nonetheless, on the merits, the State's analysis of preservation is incorrect under state law, and fails to consider the jury instructions under the proper standard of harm, relying instead on a sufficiency analysis.

If anything, the State's arguments about the "overwhelming" evidence in support of the verdict only confirm the ineffectiveness of Davila's counsel on direct appeal. As the State argues, challenging the sufficiency of the evidence was hopeless – yet a challenge to sufficiency was the centerpoint of Davila's direct appeal. Counsel providing effective assistance could not have chosen this argument over the challenge to the jury instructions.

A. Under Texas law, the challenge to the jury instructions could have been raised on direct appeal.

The State is incorrect to suggest that Davila's challenge to his jury instructions was unpreserved by trial counsel and forfeited.

Under Texas criminal law, objections to jury instructions cannot be forfeited: "[C]harge error is never forfeitable by a defendant's failure to object at trial." *Cosio* v. *State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011).

When a Texas defendant raises a charge issue on appeal, an "appellate court's first duty . . . is to determine whether error exists." *Middleton* v. *State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003). "[I]f error is found, the appellate court should analyze that error for harm." *Ibid.*

The standard for harm depends on whether the defendant objected at trial. Where, as here, the defendant objected to the instruction, reversal is required if there was "some harm." *Barrios* v. *State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). But even when there is no objection at trial, a court of appeals will reverse the conviction when the erroneous instruction has caused "egregious harm," when the error either "go[es] to the very basis of the case" or "vitally affect[s] [the] defensive theory." *Almanza* v. *State*, 686 S.W.2d 157, 172 (Tex. Crim. App. 1984) (quoting *Bellah* v. *State*, 415 S.W.2d 418 (Tex. Crim. App. 1967) and *Franco* v. *State*, 147 S.W.2d 1089 (Tex. Crim. App. 1941)).

As a positive legal matter, the complaint about Davila's jury instructions could not have been forfeited. And regardless of the harm standard, the issue should have been raised on direct appeal as a normative matter.

Davila would have been entitled to the "some harm" standard. In Texas criminal procedure, preservation "is not an inflexible concept." *Thomas* v. *State*, 408 S.W.3d 877, 884 (Tex. Crim. App. 2013). "[A]ll a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants,

why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it." *Ibid.* A defendant must "enable the trial judge to know in what respect the defendant regards the charge as defective and to afford him an opportunity to correct it before reading the charge to the jury." *Pennington* v. *State*, 697 S.W.2d 387, 390 (Tex. Crim. App. 1985).

In this case, Davila's trial counsel let the trial judge know that he did not want the trial judge to submit the erroneous instruction as an answer to the jury's question, and he did so at a time before the trial judge provided the answer. R.10377 ("we'd object to the submission of the second charge"). Nothing more was required.

B. Under Texas law, the jury instructions were erroneous and harmful.

Although the State endeavors to defend the jury instructions, the crucial point is incontestable: Nothing in the instructions captured the Texas rule barring double-transferred intent.

Admittedly, as the State notes, this doctrine arises from caselaw rather than the text of the transferred intent statute. And perhaps, after Davila's appeal is reinstated, the State may wish to argue that the Court of Criminal Appeals should abandon the doctrine. But until the Court of Criminal Appeals has done so, the

prohibition on transferring the same intent twice remains Texas law, and the trial court erred by instructing the jury that it could convict Davila of two intentional murders based on a single intent to kill.

Although the supplemental instruction correctly quoted Texas' transferred intent statute, it incorrectly permitted the jury to transfer Davila's intent from a single intended victim to the two actual victims.

The State argues that even if the jury instructions were erroneous, raising the issue on appeal was unwarranted because Davila could not show harm. But the State fails to analyze harm under the correct standard.

In determining whether a defendant has suffered harm, Texas courts consider "the entire charge; the state of the evidence, including contested issues and the weight of probative evidence; the arguments of counsel; and any other relevant information the record, as a whole, reveals." *Heins* v. *State*, 157 S.W.3d 457, 461 (Tex. App. – Houston [14th Dist.] 2004, no pet.). Neither the State nor the defendant bears a burden in the harm analysis. *Reeves* v. *State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

Because Davila's trial counsel objected to the instruction, any harm – of any degree – from the error requires reversal. "'Some harm' under the *Almanza* analysis means any harm." *Murphy* v. *State*, 44 S.W.3d 656, 666 (Tex. App. – Austin 2001, no pet.) (citing *Hutch* v. *State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996)). "Presence of any harm, regardless of degree,

which results from preserved charging error, is sufficient to require reversal of a defendant's conviction." *Ibid.*

But even under the "egregious harm" standard, Davila is entitled to relief. The erroneous instruction eliminated the only viable defensive theory: that Davila only intended to kill Jerry Stevenson. Because the error vitally affected the defensive theory and went to the entire basis of the defendant's case, the error constituted egregious harm.

Instead of considering harm under these standards, the State merely recites in the evidence in the light most favorable to the verdict, analyzing the sufficiency of the evidence supporting the verdict rather than the harm from the erroneous charge.

In effect, the erroneous instruction eliminated an element of the offense by relieving the State of its burden to prove two separate intents to kill. Under Texas law, such an error in the charge renders a conviction "fatally defective":

> [W]hen a trial court omits from the application paragraph of the charge required elements of an offense, this also will render a conviction fatally defective. To rule otherwise, we believe, would permit and allow our trial courts to state in a jury charge abstract definitions of legal terms and principles of law, without the necessity of applying those principles and terms to the very facts of the case. We further believe that to uphold such a rule

> of law could lead to the destruction of our jury system.

Doyle v. *State*, 631 S.W.2d 732, 735 (Tex. Crim. App. 1980). The evidence marshalled by the State cannot overcome this fatal defect in the conviction.[4]

Davila could also satisfy the egregious harm test because the error went "to the very basis of the case" and "vitally affect[ed] [the] defensive theory." *Almanza*, 686 S.W.2d at 172. The error in the instruction went to the basis of Davila's case and vitally affected Davila's intent defense. The instruction invalidated Davila's strongest defense. *See Heins*, 157 S.W.3d at 457 (finding egregious harm where erroneous instruction prevented the only defense offered at trial.).

The jury could have rationally concluded that Davila had the intent to kill only Jerry Stevenson based on evidence that Davila had an altercation with Jerry Stevenson (who was associated with a rival gang) shortly before the murder. R.10026-10027; R.10031; R.10176-10177; R.10336-10340. The jury could also have credited the testimony that the red beam shined only on Jerry Stevenson. R.9950 ("Q: And was the beam anywhere else that you saw? A: Not really."); R.9951 ("Q: Did you see the beam on the women and children? A: No. Q: You never saw the beam on the women and children? A: Nuh-uh.").

---

[4] Whether Davila suffered prejudice from the ineffective assistance of his direct appellate counsel turns on whether, under state law, Davila would have received relief if his direct appeal had been handled properly.

And the jury was entitled to interpret Davila as confessing intent to kill only Jerry Stevenson, given that there were no other "guys on the porch." R.10019. ("Q: No other adult males? A: No, ma'am. I was the only male."). The State's argument that "guys on the porch" referred to the women and children may be a permissible inference, but it is by no means compelled. Davila's defense that he intended to kill only Jerry Stevenson may not have succeeded if the jury had been permitted to consider it, but it was the only real defense he had.

Indeed, the jury's note provides the strongest possible evidence of harm, indicating that at least some jurors believed that Davila "intend[ed] to murder a person and in the process took the lives of two others." JA.60.

The jury instructions were erroneous and harmed Davila. If the issue had been raised on direct appeal, Davila's conviction would have been reversed.

C. The State's sufficiency arguments confirm the ineffectiveness of Davila's direct appellate counsel.

But instead of challenging the jury instructions, Davila's counsel on direct appeal challenged the sufficiency of the evidence that Davila intended to kill multiple individuals.

The State's brief confirms the hopelessness of these arguments. *See* State Br. at 46-48 (analyzing the

sufficiency of the evidence). As the Court of Criminal Appeals held on direct appeal, sufficient evidence certainly supported the conclusion that Davila intended to kill multiple individuals. In light of the evidence discussed by the State, no lawyer providing effective assistance of counsel would have raised this issue on appeal and chosen to abandon the far-stronger issue regarding the erroneous jury instructions. This is particularly true when the jury's note confirmed that the jury (or at least some members of the jury) believed Davila harbored only a single intent to kill.

The State's brief thus confirms the ineffectiveness of Davila's counsel on direct appeal. Davila has raised a substantial claim of ineffective assistance of appellate counsel, and the ineffective assistance of counsel in his initial-review collateral proceeding should excuse the procedural default of this claim.

CONCLUSION

The Court should reverse the judgment below, hold that ineffective assistance of counsel in an initial-review collateral proceeding may excuse procedural default of a substantial claim of ineffective assistance of counsel on direct appeal, and remand for application of this rule.

April 14, 2017

Respectfully submitted,

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RECORD AND BRIEFS

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ERICK DANIEL DAVILA,

Petitioner,

vs.

LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Martinez v. *Ryan* held that its exception to the *Coleman* v. *Thompson* rule was limited to claims of ineffective assistance of *trial* counsel and that *Coleman* would govern in all other circumstances, which necessarily includes claims of ineffective assistance of *appellate* counsel.

Should *Martinez* be overruled to the extent of that limitation, thereby extending its exception to appellate counsel claims?

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IN THE

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ERICK DANIEL DAVILA,

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Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, Petitioner seeks to further erode the finality of capital cases by further widening an excep-

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

tion to the landmark case of *Coleman* v. *Thompson*. This erosion would cause further delay in cases that are already delayed too long, contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts of the crime are related in the opinion of the Texas Court of Criminal Appeals on direct appeal. See J. A. 104-110. On April 6, 2008, Annette Stevenson held a birthday party for her nine-year-old granddaughter at her home in Fort Worth, Texas. Fifteen children were on the porch eating ice cream and cake. Mrs. Stevenson's son, Jerry Stevenson, was the only adult male present. J. A. 104. A man fired multiple shots at the porch. Three girls and one woman were wounded. Mrs. Stevenson and her five-year-old granddaughter, Queshawn, were killed. J. A. 105. Crime scene investigators found "bullet holes . . . all along the porch walls and in the windows of the Stevenson home." J. A. 108.

After an investigation, police arrested petitioner Erick Davila, and he made four written statements. In the third one, he admitted committing the crime with a gun he referred to as an "AK," which had a scope. He stated that he did not know that the people on the porch other than Jerry were all women and children, but thought his targets were all men, whom he referred to as "the fat dude" and "the other 3." J. A. 109. He claims he has "clinically bad eyesight." Pet. for Cert. 8-9. Davila said he "*only* let off 10 rounds," and "I was trying to get the *guys* on the porch *and* I was trying to get the fat dude." J. A. 109-110 (emphasis added). By his own admission, then, he fired ten rounds from an AK-47 type gun at a porch full of people and was specifically targeting four people.

The variant of capital murder charged in this case requires that the defendant "knowingly or intentionally" killed more than one person, but it does not require that the people the defendant intended to kill or knew would be killed be the same people who were actually killed. See *infra*, at 18.

The jury sent a note asking for clarification on the required mental state. See J. A. 362 (Federal District Court opinion). The trial court responded with one additional instruction on mental state and one on transferred intent. See J. A. 363-364. The defendant's only objection was that the second instruction should be held and only given if needed later. Trial counsel did not object on the ground that the instructions were legally incorrect. See J. A. 51-53, 366. Counsel did not request an additional instruction pinpointing the issue of the number of people targeted by the defendant. See *ibid.*

On direct appeal, counsel raised 14 points of error, 9 of which related to the defendant's devastating statements. See J. A. 86-90. One claim challenged the sufficiency of the evidence on mental state, J. A. 92-102, arguing that the evidence showed the defendant intended to murder only one person. The CCA affirmed, finding ample evidence that the defendant intended to kill more than one person. J. A. 113-115.

On state habeas corpus, Petitioner made no claim of ineffective assistance of trial counsel. J. A. 134.

On federal habeas corpus, the District Court found that the claim of ineffective assistance of appellate counsel was procedurally defaulted because it was not made on state habeas corpus. J. A. 360-361. The District Court nonetheless went on to consider the claim on the merits. Appellate counsel was not ineffective because the instructions were not erroneous.

Further, "any alleged error did not result in harm under either *Almanza* standard," J. A. 366, referring to the State's standards for preserved and unpreserved errors. Further, the District Court denied a certificate of appealability (COA) because the Petitioner had "failed to make a substantial showing of the denial of a constitutional right." J. A. 386.

The Court of Appeals also denied a COA, holding that the claim was procedurally defaulted, and that *Martinez* v. *Ryan*, 566 U. S. 1 (2012), and *Trevino* v. *Thaler*, 569 U. S. __, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013), did not create an exception for ineffective assistance of trial counsel claims. The Ninth Circuit held to the contrary in *Nguyen* v. *Curry*, 736 F. 3d 1287, 1293 (2013). This Court granted certiorari on February 27, 2017.

SUMMARY OF ARGUMENT

Fidelity to *stare decisis* demands that the limits that *Martinez* v. *Ryan* set for its rule be maintained. *Martinez* unambiguously limited its exception to *Coleman* v. *Thompson* to claims of ineffective assistance of *trial* counsel and held that *Coleman* would continue to apply in all other circumstances. Petitioner is therefore asking for a partial overruling of both *Martinez* and *Coleman*.

Stare decisis has particular force when Congress exercises primary authority in the area and remains free to alter what this Court has done. In enacting the habeas reforms of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress made a number of changes in the law of habeas corpus procedure, but it chose to leave the rule of *Coleman* intact. No justification has been shown for a departure from

precedent. The rule has not been undercut, and it has not proved unworkable.

Unlike most areas of procedure, the reliance interest is strong here. Because of the interrelation between state and federal habeas corpus, persons crafting rules for state habeas must take federal habeas rules into account so that the systems dovetail and federal courts do not consider unexhausted claims never presented to any state court. Making rules is not easy in such a contentious area of law, and constant change in federal rules frustrates efforts to make the systems mesh.

The "particular concern" of *Martinez* is not present with ineffective assistance of appellate counsel claims. The *Martinez* Court was particularly concerned that if trial counsel were ineffective then an error seriously affecting the fairness of the trial would neither be raised at trial nor cognizable on appeal, and state collateral review would be the first chance to raise it. On the other hand, if a grave error affecting the trial occurred and trial counsel *was* effective, then trial counsel raised the objection and got one ruling on it, from the trial judge. For a properly preserved objection, an ineffective appellate lawyer can only default a chance to receive a second ruling on the question, a much less compelling case for further eroding *Coleman*. If trial counsel was ineffective and failed to raise it, then *Martinez* applies directly without a need for an extension.

Martinez has seriously eroded finality already, compromising the objective of AEDPA. In a sample of post-*Martinez* federal capital habeas cases from Arizona, 70% had *Martinez* issues that had to be litigated and decided. None were determined to be meritorious. *Martinez* adds complexity and delay to a system that is already too complex and already takes too long. Fur-

ther widening the *Martinez* exception to *Coleman* would further erode the important value of finality.

ARGUMENT

I. Fidelity to *stare decisis* demands that the limits *Martinez* v. *Ryan* set for its rule be maintained.

The problem of constantly shifting rules in federal habeas corpus review of state decisions is not a new one. Justice Jackson famously noted long ago, "Whatever has been intended, this Court also has generated an impression in much of the judiciary that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principles." *Brown* v. *Allen*, 344 U. S. 443, 535 (1953) (concurring in the judgment).

To answer the question presented in this case, the Court need look no further than the words of *Martinez* v. *Ryan*, 566 U. S. 1 (2012). "This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance *at trial*." *Id.*, at 9 (emphasis added) "The rule of *Coleman* governs in *all* but the limited circumstances recognized *here*." *Id.*, at 16 (emphasis added).

Does "all" mean "all" or does it mean "some"? Does "recognized here" mean "recognized here" or does it mean "recognized here plus an indeterminate number of future cases"? Does "at trial" mean "at trial" or does it mean "at trial or on appeal"? Do words mean what they have always meant? Does the law know fixed principles? If the *Martinez* Court meant what it said,

and if the dissent's accusation, see *id.*, at 19 (opinion of Scalia, J.), was indeed overwrought, then the question presented has already been decided, and that is the end of this case.

The word "overruled" does not appear in Petitioner's brief, and the brief contains no discussion of *stare decisis*. Nonetheless, Petitioner is asking for nothing less than a partial overruling of both *Coleman* v. *Thompson*, 501 U. S. 722, 752-754 (1991) and *Martinez* v. *Ryan*. *Coleman* held that ineffective assistance of counsel in a proceeding where there is no constitutional right to counsel is not "cause" for the purpose of the procedural default rule. *Id.*, at 754. *Martinez*, as noted above, held that its "narrow exception" to *Coleman* was limited to claims of ineffective assistance of *trial* counsel and that *Coleman* would continue to govern in *all* other circumstances, which includes the circumstance of this case.

The question then is whether *Coleman* and *Martinez* should be overruled in part so as to further erode the protection of finality of criminal judgments that *Coleman* provided. "Overruling precedent is never a small matter." *Kimble* v. *Marvel Entertainment, LLC*, 576 U. S. __, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463, 471 (2015). The simplest reason to maintain *Coleman* with no further exceptions is that this landmark case was correctly decided and gave proper weight to the vitally important interest in finality of judgments. See 501 U. S., at 750. *Stare decisis* is an alternative answer to the argument that a precedent was incorrectly decided, see *Kimble*, 135 S. Ct., at 2409, 192 L. Ed. 2d, at 471-472, and its invocation makes it unnecessary to decide whether a prior case was correctly decided, "saving parties and courts the expense of endless relitigation." *Ibid.* "*[S]tare decisis* is a foundation stone of the rule of law," and any argument for departure " 'demands

special justification.' " *Michigan* v. *Bay Mills Indian Community*, 572 U. S. __, 134 S. Ct. 2024, 2036, 188 L. Ed. 2d 1071, 1089 (2014) ("*Bay Mills*") (quoting *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984)).

This Court has noted many times that "considerations of *stare decisis* have special force in the area of statutory interpretation." *CBOCS West, Inc.* v. *Humphries*, 553 U. S. 442, 452 (2008) (internal quotation marks omitted). This principle is not limited to decisions interpreting the words of statutes, however. It also applies to a precedent when "Congress exercises primary authority in [the] area and 'remains free to alter what [this Court has] done.' " *Bay Mills*, 134 S. Ct., at 2036, 188 L. Ed. 2d, at 1089. *Bay Mills* involved a precedent on tribal sovereign immunity, and the "special force" principle applied when Congress had repeatedly legislated in the area but declined to alter the precedent in question. Similarly, *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U. S. __, 134 S. Ct. 2398, 2411, 189 L. Ed. 2d 339, 354 (2014) applied the "special force" principle to a precedent that had established a presumption as a "judicially created doctrine" "because it provides a way of satisfying the reliance element of the Rule 10b-5 cause of action."

The history of congressional involvement in habeas corpus procedure is similar. The exhaustion rule was originally case law, see *Ex parte Royall*, 117 U. S. 241, 253 (1886), but Congress eventually codified it. See 28 U. S. C. §2254(b), (c).[2] Soon after codification, the procedural default rule was considered to be part and parcel of the exhaustion rule. The fact that the unexhausted remedy no longer existed due to the petitioner's default did *not* render the claim exhausted for

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2. All section references are to 28 U. S. C. unless otherwise indicated.

the purpose of § 2254. *Brown* v. *Allen*, 344 U. S., at 487. While this holding of *Brown* has since been abandoned, see, *e.g.*, *Woodford* v. *Ngo*, 548 U. S. 81, 92-93 (2006), the statutory exhaustion rule and the mostly nonstatutory procedural default rule remain closely related. Protecting the integrity of the exhaustion rule is a large part of the rationale for the procedural default rule. See *ibid.*; *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999).

When Congress enacted comprehensive reform of habeas corpus in AEDPA, it made major changes to the successive petition rule, see § 2244(b), the timeliness requirement, see § 2244(d), and the effect of prior state rulings on questions of federal law. See § 2254(d). On the other hand, Congress was evidently satisfied with this Court's development of retroactivity law in *Teague* v. *Lane*, 489 U. S. 288 (1989), and its progeny and made no change to it. See *Greene* v. *Fisher*, 565 U. S. 34, 39 (2011) (*Teague* and AEDPA inquiries are distinct).

With regard to exhaustion and procedural default, Congress made some adjustments but did not change the bulk of the case law. For efficiency, Congress allowed the dismissal of meritless claims even when unexhausted, see § 2254(b)(2), and it prevented the inadvertent forfeiture of an exhaustion defense by the State. See § 2254(b)(3). For procedural default, Congress codified in part the prior case-law rule on failure to develop facts in state court, see *Williams* v. *Taylor*, 529 U. S. 420, 434 (2000), but tightened up the exceptions to default. See § 2254(e)(2)(A), (B). Except for these adjustments, the absence of changes indicates that Congress believed that the exhaustion and default rules as they existed in case law prior to 1996 fit into the picture that Congress envisioned for federal habeas corpus review of state convictions as a whole. "So rather than confronting . . . a legislative vacuum as to

the precise issue presented," this case must be decided "against the backdrop of a congressional choice: to retain" the procedural default rule and its exceptions with only the relatively minor adjustments made in AEDPA. Cf. *Bay Mills*, 134 S. Ct., at 2038-2039, 188 L. Ed. 2d, at 1091-1092.

The law of habeas corpus is not a collection of unrelated doctrines. The exhaustion rule, the procedural default rule, the statute of limitations, the retroactivity limitation, the successive petition rule, and the deference standard all relate to the delicate balance between "the importance of finality in state criminal litigation," *Coleman*, 501 U. S., at 747, and the need to maintain habeas corpus as a " 'guard against extreme malfunctions in the state criminal justice systems.' " *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)). Congress took a strong stand in AEDPA that reducing delay needed to be given a higher priority, and it altered the balance in that direction. See *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003).

The procedural default rule generally and *Coleman* in particular have "effectively become part of the statutory scheme." Cf. *Kimble*, 135 S. Ct., at 2409, 192 L. Ed. 2d, at 472. Changing the rules alters the balance from the one Congress chose, whether the change is to the interpretation of the statutes Congress enacted or to the case law that was woven into the canvas on which Congress painted.

This Court did, of course, change the rules in *Martinez* and *Trevino* v. *Thaler*, 569 U. S. __, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013), but that alteration should not be regarded as *carte blanche* to disregard *stare decisis* from this point forward. Any proposal for

further change to the congressionally determined balance must clear the "special force" hurdle.

None of the usual justifications for making an exception to *stare decisis* applies to this case. *Coleman* is not a constitutional doctrine immune from legislative alteration, but rather a rule that Congress is " 'free to alter.' " *Bay Mills*, 134 S. Ct., at 2036, 188 L. Ed. 2d, at 1089 (quoting *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172-173 (1989)). Nor has experience with applying the *Coleman* rule revealed that it is unworkable. Cf. *Johnson* v. *United States*, 576 U. S. __, 135 S. Ct. 2551, 2562, 192 L. Ed. 2d 569, 584 (2015). The *Coleman* rule is quite simple to apply. A federal habeas corpus petitioner seeking to qualify for the "cause and prejudice" exception cannot cite ineffective assistance of state habeas counsel as his cause and must look elsewhere.

The *Coleman* rule has not been undercut by "either the growth of judicial doctrine or further action taken by Congress," which is the "primary reason" for overruling statutory precedent. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989); *Kimble*, 135 S. Ct., at 2410, 192 L. Ed. 2d, at 473. As noted above, the further action by Congress was a determination that the case law did not go far enough in protecting finality and reducing delay, just the opposite of a trend that would justify reconsidering *Coleman*. While *Martinez* did make an exception, it took pains to emphasize that the exception was narrow and to reaffirm the *Coleman* rule outside the scope of the exception. See 566 U. S., at 9, 16.

Finally, there is the matter of reliance. While it is sometimes said that the reliance interest is reduced in matters of procedure, see *Payne* v. *Tennessee*, 501 U. S. 808, 828 (1991), that is not true when a change is not fully self-executing but requires adjustments by legisla-

tive or rule-making bodies, either to implement the decision or to avoid adverse impact to other important values. The problem is particularly acute for rules on collateral review of state criminal judgments because these cases pass through two different judicial systems, and each system's rules must take account of the other.

Federal habeas corpus has many rules that depend on the process in state court. The question of when a California state habeas corpus case is "pending" within the meaning of the tolling rule of § 2244(d)(2) raised problems sufficient to require consideration twice by this Court. See *Carey* v. *Saffold*, 536 U. S. 214 (2002); *Evans* v. *Chavis*, 546 U. S. 189, 199 (2006). Congress simply did not consider California's quirky practices when it crafted the tolling rule, and this Court went so far in *Evans*, *supra*, at 199, to suggest that the state change its rules to alleviate the problem.

State rules must also be written with federal law in mind if the state wishes to avoid circumvention of the exhaustion rule and the routine litigation in federal court of issues never decided on the merits in state court. The exhaustion doctrine is one of the oldest principles in habeas corpus law, and its importance was confirmed by Congress when it amended § 2254(b) in AEDPA. "[T]he exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts," *O'Sullivan*, 526 U. S., at 845, and state rule drafters must necessarily consider the exceptions to the federal procedural default rule in crafting their own default and successive petition rules.

Under *Coleman*, a state could declare defaulted any claim that had not been made in either the direct appeal or the initial collateral review petition in the trial court without any cause external to the defense. It could craft its rules on successive and untimely

petitions to make such exceptions as it deemed appropriate, knowing that the federal courts would consider the claims it chose to bar only if the exceptions to the default rule were met, with ineffective assistance of habeas counsel not being an exception. An exception to *Coleman* requires a state to choose between making a parallel exception in its own rules or allowing its prisoners to dance around the exhaustion rule and make claims in federal court that have never been properly presented to a state court.

Adjusting a state's rules is no small matter. Habeas corpus is closely linked with the highly contentious issue of capital punishment. See *Woodford* v. *Garceau*, 538 U. S., at 206 ("particularly in capital cases"). The rules are often statutory, and constitutions are intentionally crafted to make legislation difficult. See Scalia, How Democracy Swept the World, Wall Street Journal, Sept. 7, 1999, p. A24. In California, for example, after many years of legislative gridlock, supporters of habeas corpus reform finally succeeded in the difficult and expensive process of putting an initiative on the ballot, and the habeas corpus review provision is crafted to accommodate *Martinez*. See Cal. Penal Code § 1509.1(b). Further modification to accommodate further exceptions to the *Coleman* rule is extremely unlikely.

Because federal and state rules need to dovetail in order to provide a coherent and efficient system of review, there is a strong interest in stability of the rules. The standard brush-off for reliance in matters of procedure is inappropriate here.

Even if the creation of further exceptions to *Coleman* were a desirable rule supported by sound considerations of policy, the principles of *stare decisis* would counsel against it. But it is not. The primary reason for the creation of the *Martinez* exception does not

apply, and the reasons behind *Coleman* remain compelling.

II. The "particular concern" of *Martinez* does not apply to ineffective assistance of appellate counsel.

The *Martinez* Court believed that an exception to the *Coleman* rule was warranted in large part because of the special role of trial counsel in the system of criminal justice. "The right to the effective assistance of counsel *at trial* is a bedrock principle in our justice system." *Martinez* v. *Ryan*, 566 U. S. 1, 12 (2012) (emphasis added). Appellate attorneys play an important role in the system, to be sure, but it is a different role, and different considerations apply.

This Court has often referred to the trial as the "main event." See *Wainwright* v. *Sykes*, 433 U. S. 72, 90 (1977); *Beard* v. *Kindler*, 558 U. S. 53, 62 (2009). The primacy of trial is reflected in the original Constitution and the Bill of Rights. The original Constitution guaranteed trial by jury and a venue at the place of the crime. See U. S. Const., Art. III, § 2. The Sixth Amendment reiterated these guarantees and added several other required safeguards, particularly "the assistance of counsel for his defence." In contrast, there is nary a word in the Constitution about appeals.

At the time the Constitution and the Bill of Rights were adopted, it was considered entirely consistent with due process of law to make a trial court judgment in a criminal case unreviewable by any judicial process, leaving executive clemency as the only remedy. This Court originally had no jurisdiction to hear appeals from convictions by circuit courts, see *Ex parte Watkins*, 28 U. S. (3 Pet.) 193, 201 (1830), and habeas corpus was not available then to review a final judgment of a court

of general jurisdiction. *Id.*, at 209; see also Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 928-932 (1998) (discussing *Watkins*). *McKane* v. *Durston*, 153 U. S. 684, 687 (1894) confirmed that there is no constitutional right to appeal, and this holding is still good law. See, *e.g.*, *Halbert* v. *Michigan*, 545 U. S. 605, 610 (2005) (citing *McKane*).

Of course, all states do provide appeals of some kind today. See 7 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 27.1(a), p. 3 (4th ed. 2015). Even so, the purpose of appeals is secondary. A fair trial is the constitutionally required safeguard for the defendant; appeals exist only to safeguard the right to a fair trial. Ineffective assistance of trial counsel directly impairs the defendant's right to a fair trial, but ineffective assistance of appellate counsel has only an indirect effect on the core right.

The particular concern of *Martinez* was that an error affecting the defendant's core right to a fair trial might never be raised by any lawyer through the initial-review collateral proceedings and therefore never decided on the merits at all. See *Trevino* v. *Thaler*, 569 U. S. __, 133 S. Ct. 1911, 1918, 185 L. Ed. 2d 1044, 1053 (2013). For obvious reasons, trial courts rarely rule on ineffective assistance of trial counsel claims during the course of the original trial. See *ibid.* (noting inadequacy of motion for new trial to present issue). Thus if the error that made the defendant's trial unfair was ineffective assistance of his trial lawyer, his state collateral review lawyer typically provides his first chance to correct that error, and if a strict default rule applies, this will be his only chance.

Failure of the direct appeal lawyer to brief a strong claim, the error alleged here, stands on a different footing. Such an error cannot be committed unless

there was a serious error in the trial court. An appellate lawyer's decision not to brief a weak claim, "far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith* v. *Murray*, 477 U. S. 527, 536 (1986).[3] Only a serious error would reach the threshold of being one that every effective appellate lawyer *must* brief. Further, under standard appellate practice, only errors appearing in the trial record are cognizable on appeal, see *Trevino*, 133 S. Ct., at 1918, 185 L. Ed. 2d, at 1053-1054, and therefore only such errors can be the underlying errors for an ineffective assistance of appellate counsel claim. If an error in the trial record is so glaring and prejudicial that failure to brief it on appeal amounts to ineffective assistance of appellate counsel, then effective trial counsel would object to it and obtain a ruling from the trial court.

Generally speaking, then, if trial counsel was effective the underlying claim has been decided on the merits by at least one court, the trial court. If trial counsel was ineffective, *Martinez* applies directly and there is no need for an extension of it. The problem underlying the *Martinez* exception, that ineffective assistance of collateral counsel deprived the petitioner of his one and only chance to get review of a claim seriously affecting the fairness of his trial, will rarely, if ever, occur in these circumstances.

Underlying claims regarding jury instructions, as in the present case, illustrate the usual situation. If jury instructions are both legally erroneous and clearly adverse to the defendant, an effective trial attorney will object to them. If trial counsel does not object for strategic reasons, believing the error runs in the defendant's favor in the particular circumstances of the case,

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3. *Smith* was a capital case. See *id.*, at 530. Death is not different in this regard.

the objection is properly regarded as waived, and appellate counsel may properly winnow out that issue. The parties disagree whether the underlying issue was properly preserved at trial in the present case. Compare Respondent's Brief in Opposition 14 with Petitioner's Brief 6; see J. A. 51-52 (objection); J. A. 366 (District Court: objection was to timing, not correctness). To the extent that trial counsel's half-baked objection presented the issue, the trial judge's overruling of it constituted a decision on the merits.

The *Martinez* Court was concerned about a scenario where "it is likely that no state court at any level will hear the prisoner's claim." 566 U. S., at 10. As to the underlying claim directly impacting the fairness of the trial, that is highly unlikely in the situation presented by this case, assuming effective trial counsel. The petitioner might not get any review of his second-level claim, which directly affects only the appeal, not the trial, but that is a very large step removed.

To say that there is no distinction between effective assistance of trial and appellate counsel is absurd. See Brief for the National Association of Criminal Defense Lawyers, *et al.*, as *Amici Curiae* 19. There is a huge distinction. There is a reason why effective assistance of trial counsel was recognized as a constitutional right half a century before effective assistance of appellate counsel. See *Powell* v. *Alabama*, 287 U. S. 45, 71 (1932); *Evitts* v. *Lucey*, 469 U. S. 387, 396 (1985); see also *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting) ("fundamental" errors are those in the "classic" cases). There is a reason why assistance of trial counsel is guaranteed in black and white in the Sixth Amendment while assistance of appellate counsel had to be teased out of the Due Process Clause. *Evitts*, *supra*, at 396.

The reason is the vastly greater potential for an actual miscarriage of justice. "Without [the guiding hand of trial counsel], though [the defendant] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell*, 287 U. S., at 69. In the case of a defendant who had an effective trial attorney, ineffective assistance of appellate counsel will result in a miscarriage of justice only *if* a reversible error occurred at trial despite trial counsel's efforts and *if* that error caused the conviction of an innocent person. That is not impossible, but it is far less likely than the scenario envisioned by *Powell*. An exception to *Coleman* would be needed only *if* this unlikely scenario occurred and *if* an ineffective habeas corpus lawyer failed to raise it and *if* the petitioner cannot qualify for the "actual innocence" gateway. See *House* v. *Bell*, 547 U. S. 518, 536-537 (2006). As the "ifs" pile up, the probabilities become vanishingly small.

In the present case, particularly, there is clearly no miscarriage of justice. The defendant's properly admitted confession clearly stated an intent to kill more than one person. See J. A. 109-110 (CCA opinion). On top of that, Petitioner's claim that Texas law necessarily requires specific intent to kill more than one person for capital murder, Brief for Petitioner 4, is not correct. Texas Penal Code section 19.02(b)(1) defines one type of murder as "intentionally or knowingly causes the death of another." Section 19.03(a)(7) raises this type of murder to capital murder if the defendant murders more than one person. Nowhere does the law required specific intent as opposed to knowledge. By his own admission, Davila fired ten bullets at a porch full of people. See J. A. 109-110. If that does not qualify as "knowing," it is hard to imagine what does.

The case for another exception to *Coleman* is far weaker in this case than it was in *Martinez*.

III. *Martinez* is already a serious impediment to finality and should not be expanded.

Petitioner promises that his proposed extension of *Martinez* would have only modest practical consequences. Brief for Petitioner 26. This is very much like Lucy promising to hold the football for Charlie Brown. The promise is always made and never kept. Every new exception to finality will be invoked in every capital case where an argument—even a frivolous one—can be made that it applies, and these claims will have to be litigated.

Petitioner notes, correctly, that under *Martinez*, "the underlying claim must be substantial." Brief for Petitioner 26. But that is the requirement to *succeed* under *Martinez*. That is not the requirement to *make* a claim under *Martinez*, require the state to oppose it, require both the District Court and the Court of Appeals to decide it (or at least decide whether to issue or expand a certificate of appealability), require this Court to consider a certiorari petition on it, and maintain a stay of execution while all this happens. *Martinez* is only one of many impediments to finality, to be sure. But it is a brick in the wall, and a brick wall can be a major obstruction even when no single brick is.

To get a rough assessment of how often *Martinez* comes up as an issue, *amicus* took as a sample the last ten opinions in cases from Arizona listed as "prisoner death penalty" cases on the opinion search page of the Ninth Circuit's website. Arizona was chosen because that is where *Martinez* has been in effect the longest. It has only applied to most states since *Trevino*. The

cases are listed and described in the Appendix to this brief.

Seven out of ten cases had *Martinez* issues that had to be litigated and decided, eight if we count the proposal to expand *Martinez* to new territory. In no case has a meritorious claim been found to date. The Ninth Circuit found no merit in five cases. One claim was found meritless in District Court on remand, although an appeal is pending. One claim will never be decided because the petitioner died before any court had decided the merits.

This is a small sample, to be sure, but seven out of ten is a very large portion, sufficient to demonstrate that the costs of *Martinez* are already high in terms of the expense and delay of litigating claims that previously could have been dismissed at the threshold under *Coleman*. Any further expansion of *Martinez* will only aggravate the problem.

Capital cases take far too long to resolve already. Congress was sufficiently concerned about this problem from the victims' and the public's perspective to enact AEDPA, and concerns have been raised about it from the defendant's perspective as well. "[T]his Court's Byzantine death penalty jurisprudence," *Knight* v. *Florida*, 528 U. S. 990, 991 (1999) (Thomas, J., concurring in denial of certiorari), is certainly a big part of the problem, but the erosion of the pillars of finality is also a big part. No further erosion is called for in the case of a man who undisputedly fired ten or more bullets at a porch full of people with murderous intent, killing a five-year-old child and her grandmother.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

March, 2017

Respectfully submitted,

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APPENDIX

A Sample of Capital Habeas Cases from Arizona

The following cases are the last ten opinions in cases from Arizona listed as "prisoner death penalty" cases on the opinion search page of the Ninth Circuit's website, http://www.ca9.uscourts.gov/opinions/index.php, as of March 9, 2017, skipping orders and opinions that were not in a procedural posture for a *Martinez* issue to be raised. For example, *Washington* v. *Ryan*, 833 F. 3d 1087 (CA9 2016), was skipped because the only point decided was to remand to the District Court for relief from a late notice of appeal, and none of the actual claims in the petition were discussed.

1. *Dickens* v. *Ryan*, 740 F. 3d 1302 (CA9 2014) (en banc): The majority held that Dickens's new ineffective assistance of counsel (IAC) claim must be remanded for a determination of whether he can qualify for the *Martinez* exception, *id.*, at 1321-1322, over a strong dissent. See *id.*, at 1324 (opinion of Callahan, J.). The case was mooted by Dickens's death four days later. See *Dickens* v. *Ryan*, 744 F. 3d 1147 (CA9 2014).

2. *Murray (Robert)* v. *Schriro*, 745 F. 3d 984 (CA9 2014): Petitioner raised a claim that required evaluation under *Martinez*. The court denied the claim on the ground that it was not a substantial claim of ineffective assistance, thus effectively deciding a defaulted claim on the merits. See *id.*, at 1017-1018.

3. *Murray (Roger)* v. *Schriro*, 746 F. 3d 418 (CA9 2014): Petitioner is the brother and co-defendant of the petitioner in Case 2. Similarly, the court rejected his *Martinez* claim on the ground that the underlying IAC claim was not substantial, effectively adjudicating the defaulted claim on the merits.

4. *Hurles* v. *Ryan*, 752 F. 3d 768 (CA9 2014): Remanded for consideration of *Martinez* claim based on

allegedly ineffective assistance of appellate counsel. On remand, the court found neither prong of *Strickland* met, see *Hurles* v. *Ryan*, 188 F. Supp. 3d 907, 925 (DC Ariz. 2016), but granted a certificate of appealability. *Id.*, at 927. Appeal is pending, No. 16-99007.

5. *McKinney* v. *Ryan*, 813 F. 3d 798 (CA9 2015) (en banc): No *Martinez* issue was before the en banc court. In the prior panel decision, the court rejected the petitioner's attempt to extend *Martinez* beyond IAC claims. See *McKinney* v. *Ryan*, 730 F. 3d 903, 913 (CA9 2013).

6. *Hedlund* v. *Ryan*, 815 F. 3d 1233 (CA9 2016): Codefendant of McKinney, Case 5, is granted relief based on that decision. No *Martinez* issue.

7. *Gallegos* v. *Ryan*, 820 F. 3d 1013 (CA9 2016): Petitioner sought a remand to reconsider in light of *Martinez*. The panel was divided but denied remand on this ground. See *id.*, at 1040 (Callahan, J., dissenting in part).

8. *Smith* v. *Ryan*, 823 F. 3d 1270 (CA9 2016): *Martinez* argument is rejected on the ground that the underlying IAC claim is insubstantial, effectively adjudicating the defaulted claim on the merits. See *id.*, at 1295-1296.

9. *Runningeagle* v. *Ryan*, 825 F. 3d 970 (CA9 2016): In 2012, the court had remanded for consideration under *Martinez*. On the second appeal, the court held that "petitioner fails to show that his PCR counsel performed deficiently and to his prejudice," thus reaching the same result it would have reached four years earlier but for *Martinez*.

10. *Mann* v. *Ryan*, 828 F. 3d 1143 (CA9 2016): No *Martinez* issue.

RECORD AND / BRIEFS

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IN THE

Supreme Court of the United States

ERICK DANIEL DAVILA,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION AS AMICI CURIAE IN SUPPORT OF PETTTIONER

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in ensuring that defendants have a meaningful opportunity for review of substantial claims of ineffective assistance of counsel.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than one million members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Texas is one of its statewide affiliates. The ACLU and ACLU of Texas respectfully

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[1] No counsel for a party authored this brief in whole or in part. No person other than amicus or its counsel made a monetary contribution to this brief's preparation or submission. Letters consenting to the filing of this brief are on file with the Clerk.

submit this brief to assist the Court in resolving whether, in this death-penalty case, procedural default of an ineffective-assistance-of-counsel claim may be excused when the cause of the default is initial-collateral review counsel's own ineffectiveness. Given its longstanding interest in the protections contained in the Constitution, including in the Sixth, Eighth, and Fourteenth Amendments, the questions before the Court are of substantial importance to the ACLU, its Texas affiliate, and its members.

SUMMARY OF ARGUMENT

In *Martinez* v. *Ryan*, 566 U.S. 1 (2012), this Court made the equitable judgment that ineffective assistance of counsel at an initial-review collateral proceeding may constitute cause to excuse a procedural default of a substantial claim of ineffective assistance of trial counsel. This case presents the question whether *Martinez*'s equitable exception applies where the underlying claim asserts ineffective assistance of appellate counsel. The Court should hold that it does.

The considerations that led this Court to adopt the equitable exception in *Martinez* apply with equal force to a claim of ineffective assistance on appeal and warrant the same equitable judgment.

First, as in *Martinez*, the right to effective assistance of counsel on direct appeal is critically important to ensuring the fairness of a criminal proceeding. 566 U.S. at 12. Reversible errors occur frequently in criminal trials—particularly in capital cases—and direct review is the defendant's first and often best opportunity to obtain a remedy. But as in a criminal trial, effective representation is necessary to navigate the appellate process and to ensure that the state-court appeal

serves its proper function as the principal forum for adjudicating claims of error. Second, as in *Martinez*, a claim of ineffective assistance of appellate counsel cannot be raised on direct appeal, and prisoners are ill equipped to present that claim on collateral review without the effective assistance of counsel. *Id.* at 11-12. Attorney error in the initial-review collateral proceeding thus denies the defendant the opportunity to comply with state procedures and obtain adjudication on the merits of a claim involving ineffectiveness of appellate counsel, just as it does when the claim concerns the ineffectiveness of trial counsel. Finally, as in *Martinez*, treating the procedural default of an ineffective-assistance-of-appellate-counsel claim as a bar to federal habeas review will categorically foreclose any opportunity for review of the claim. "[I]f counsel's errors in an initial review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review" the claim, no matter how meritorious. *Id.* at 10-11.

The Court should hold that a federal habeas court may excuse the procedural default of a substantial claim of ineffective assistance of appellate counsel when the default arises from attorney error in an initial-review collateral proceeding.

ARGUMENT

INEFFECTIVE ASSISTANCE OF COUNSEL IN AN INITIAL-REVIEW COLLATERAL PROCEEDING SHOULD EXCUSE THE DEFAULT OF A SUBSTANTIAL INEFFECTIVE-ASSISTANCE-OF-APPELLATE-COUNSEL CLAIM

The rules that govern when a state prisoner may establish cause to excuse a procedural default are developed "in the exercise of the Court's discretion." *Martinez* v. *Ryan*, 566 U.S. 1, 13 (2012). In fashioning

those rules, the Court has consistently sought to balance concerns of finality, comity, and federalism against the importance of the writ of habeas corpus as a "'bulwark against convictions that violate fundamental fairness.'" *Coleman* v. *Thompson*, 501 U.S. 722, 747-748 (1991) (quoting *Engle* v. *Isaac*, 456 U.S. 107, 126 (1982)); *see Trevino* v. *Thaler*, 133 S. Ct. 1911, 1916-1917 (2013). In some instances, a state prisoner will have "deprived the state courts of an opportunity to address [his federal] claims in the first instance" by "fail[ing] to meet the State's procedural requirements." *Coleman*, 501 U.S. at 732. The procedural-default doctrine would typically bar a federal habeas court from reviewing such claims. *Id.* at 731-732. But "where a prisoner [has been] impeded or obstructed in complying with a State's established procedures," this Court has made the "equitable judgment" that the prisoner may be excused from the usual sanction of default. *Martinez*, 566 U.S. at 13.

Applying those principles in *Martinez*, the Court held that where state law formally precludes defendants from raising ineffective-assistance-of-trial-counsel claims on direct appeal, the ineffective assistance of counsel at the "initial-review collateral proceeding"—*i.e.*, "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial"—can constitute cause to excuse the default of a substantial trial-ineffectiveness claim. 566 U.S. at 8-14; *see Buck* v. *Davis*, 2017 WL 685534, at *9 (U.S. Feb. 22, 2017). That holding rested on three main considerations. First, if attorney error in the initial-review collateral proceeding could not excuse the default, then most likely no court would ever review the defendant's claims. *Martinez*, 566 U.S. at 10-11. Second, as on direct appeal, the court in the initial-review collateral

proceeding considers the merits of the underlying ineffective-assistance claim for the first time, and prisoners are often ill equipped to present their own claims without effective representation. *Id.* at 11-12. Third, "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system," raising a "particular concern" when the defaulted claim is "one of ineffective assistance of counsel." *Id.* at 12. In light of these considerations, the Court concluded that "the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not [be] sufficient to ensure that proper consideration [i]s given to a substantial claim." *Id.* at 14. The Court therefore held "as an equitable matter" that procedural default caused by counsel's ineffectiveness in the initial-review collateral proceeding "will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial." *Id.* at 14, 17; *see Trevino*, 133 S. Ct. at 1917-1918.

In *Trevino*, the Court considered whether the exception recognized in *Martinez* should apply also in States, like Texas, where state law effectively (even if not formally) denies most defendants a meaningful opportunity to present such claims on direct appeal. 133 S. Ct. at 1921; *see Buck*, 2017 WL 685534, at *9. Because it was "virtually impossible" for defendants to present ineffective-assistance-of-trial-counsel claims on direct appeal in light of Texas's procedural rules and the "inherent nature" of most ineffective-assistance claims, 133 S. Ct. at 1918 (internal quotation marks omitted), the Court concluded that the exception in *Martinez* ought to apply as well in Texas cases, *id.* at 1921. As in *Martinez*, the Court emphasized the critical importance of the right involved, the practical considerations favoring litigation of the claim on collateral re-

view, and the fact that applying the procedural-default bar would "deprive the defendant of any opportunity at all for review" of the underlying claim. *Id.*

The analysis in *Martinez* and *Trevino* dictates the outcome here. As set forth below, the factors that led the Court to recognize an exception to procedural default in *Martinez* and *Trevino* are equally weighty where a state prisoner seeks to vindicate a substantial claim of ineffective assistance of appellate counsel.

A. The Right To Effective Appellate Counsel Is Critically Important To The Fair Administration Of Criminal Justice

Central to *Martinez*'s reasoning was the Court's recognition that "[t]he right to effective assistance of counsel at trial is a bedrock principle in our justice system." 566 U.S. at 12. Observing that "[a] prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel," the Court reiterated the "obvious truth"—crystallized in *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963)—that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Martinez*, 566 U.S. at 12 (internal quotation marks omitted). The right to counsel is "the foundation of our adversary system," for "[d]efense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Id.* And counsel must "preserve[] claims to be considered on appeal ... and in federal habeas proceedings." *Id.*

The right to effective appellate counsel is no less foundational. This Court has long held that an indigent criminal defendant is constitutionally entitled to ap-

pointment of counsel in the first direct appeal as of right. *Douglas* v. *California*, 372 U.S. 353 (1963). And a criminal proceeding does not satisfy due process if counsel provides ineffective assistance in that appeal. *Evitts* v. *Lucey*, 469 U.S. 387 (1985).

In so holding, the Court has repeatedly recognized parallels between trial and direct appeal and the critical need in both proceedings for effective assistance of counsel. Just as the Court in *Martinez* emphasized the dangers of proceeding without counsel at trial, 566 U.S. at 12, the Court in *Evitts* focused on the perils of navigating the direct appeal without effective counsel, *see Evitts*, 469 U.S. at 396. "In bringing an appeal as of right from conviction," the Court noted, "a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful." *Evitts*, 469 U.S. at 396. To do so, however, "a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding." *Id.* Thus, "[a]n unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake." *Id.* And "the promise of *Douglas* that a criminal defendant has a right to counsel on appeal—like the promise of *Gideon* that a criminal defendant has a right to counsel at trial—would be a futile gesture unless it comprehended the right to the effective assistance of counsel." *Id.* at 397; *see also Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956) (plurality) ("There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate ap-

pellate review accorded to all who have money enough to pay the costs in advance.").[2]

The right to effective appellate counsel is particularly important in light of the critical role the direct appeal plays in criminal cases. Direct review in the state appellate court is the defendant's first and often best opportunity to obtain relief when errors occur in a criminal trial—as they frequently do. As the plurality observed in *Griffin*, "a substantial proportion of criminal convictions are reversed by state appellate courts." 351 U.S. at 18-19 (citing Note, *Reversals in Illinois Criminal Cases*, 42 Harv. L. Rev. 566 (1929)).

That remains true today. A 2015 Department of Justice study found that state intermediate appellate courts reversed judgments on the merits in 15.1 percent of non-capital felony direct appeals in 2010 and 14.8 percent of misdemeanor direct appeals in the same year. *See* Bureau of Justice Statistics, U.S. Dep't of Justice,

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[2] *See also Ha Van Nguyen* v. *Curry*, 736 F.3d 1287, 1294 (9th Cir. 2013) ("There is nothing in our jurisprudence to suggest that the Sixth Amendment right to effective counsel is weaker or less important for appellate counsel than for trial counsel."); *Goodwin* v. *Johnson*, 132 F.3d 162, 174 (5th Cir. 1997) ("[T]he right to effective assistance of counsel, both at the trial and appellate level, is recognized not for its own sake, but because of the effect that it has on the ability of the accused to receive a fair trial." (internal quotation marks omitted)). Courts apply the same standard under *Strickland* v. *Washington*, 466 U.S. 668 (1984), to adjudicate both appellate-ineffectiveness and trial-ineffectiveness claims. *See, e.g.*, *Blanton* v. *Quarterman*, 543 F.3d 230, 235 (5th Cir. 2008); *Aparicio* v. *Artuz*, 269 F.3d 78, 95 (2d Cir. 2001); *Bell* v. *Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (en banc); *Buehl* v. *Vaughn*, 166 F.3d 163, 173-174 (3d Cir. 1999); *Benvenuto* v. *State*, 165 P.3d 1195, 1202-1203 (Utah 2007); *Jones* v. *State*, 816 So. 2d 1067, 1071 (Ala. Crim. App. 2000), *overruled on other grounds*, *Brown* v. *State*, 903 So. 2d 159, 162-163 (Ala. Crim. App. 2004); *People* v. *Valdez*, 789 P.2d 406, 411 (Colo. 1990) (en banc).

Criminal Appeals in State Courts, at 5, tbl. 2 (Sept. 2015) (*State Criminal Appeals 2015 Study*), *available at* https://www.bjs.gov/content/pub/pdf/casc.pdf. The rate was even higher in capital cases: State intermediate appellate courts considering direct appeals as of right in 2010 reversed in 30 percent of death-penalty cases. *Id.*; *see also id.* at 4, tbl. 1 (showing that state courts of last resort reversed on the merits in 18.6 percent of death-penalty cases).

Longitudinal studies confirm that reversible error occurs in a substantial portion of state capital trials, underscoring the importance of effective representation on appeal to ensuring the fairness of criminal proceedings, *Martinez*, 566 U.S. at 12. A 2000 study found that, of the approximately 5,760 death sentences imposed in the United States between 1973 and 1995, approximately 4,578 were reviewed on direct appeal, and state appellate courts vacated the judgment in approximately 1,885 cases—*i.e.*, 41 percent of direct appeals—on the basis of "serious error[s]" that "substantially undermine[d] the reliability of the outcome." *See* Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 Tex. L. Rev. 1839, 1846-1847 (2000) (*Liebman Study*).[3] Of all defendants whose death sentences were overturned at any stage of review during the study period, 82 percent were found on retrial not to have deserved the death penalty, and 7 percent were cleared altogether of the capital offense. *Id.* at 1852.

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[3] The study counted only those errors that were discovered and properly preserved, were found by a court to have been prejudicial, and resulted in reversal of a capital conviction or sentence. *Liebman Study* 1847 n.29; *see also* Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at 5 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

A 2014 Department of Justice study similarly found that the conviction or sentence was overturned at some stage of review in 2,671 of the 8,466 cases in which a death sentence was imposed in the United States between 1973 and 2013—*i.e.*, approximately 31.5 percent of death-penalty cases. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2013 – Statistical Tables*, at 19, tbl. 16 (Dec. 19, 2014) (*Capital Punishment 2014 Study*), *available at* https://www.bjs.gov/content/pub/pdf/cp13st.pdf.[4] That figure

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[4] State-by-state reversal rates in capital cases, including reversals based on invalidation of the capital-punishment statute, were as follows: Alabama, 155 out of 439 (35%); Arizona, 120 out of 307 (39%); Arkansas, 45 out of 114 (39%); California, 158 out of 1,013 (16%); Colorado, 15 out of 22 (68%); Connecticut, 4 out of 15 (27%); Delaware, 26 out of 60 (43%); Florida, 469 out of 1,040 (45%); Georgia, 160 out of 325 (49%); Idaho, 21 out of 42 (50%); Illinois, 97 out of 307 (32%); Indiana, 57 out of 103 (55%); Kansas, 4 out of 13 (31%); Kentucky, 39 out of 83 (47%); Louisiana, 119 out of 245 (49%); Maryland, 36 out of 53 (68%); Massachusetts, 2 out of 4 (50%); Mississippi, 117 out of 197 (59%); Missouri, 57 out of 186 (31%); Montana, 6 out of 15 (40%); Nebraska, 12 out of 33 (36%); Nevada, 44 out of 156 (28%); New Hampshire, 0 out of 1 (0%); New Jersey, 33 out of 52 (63%); New Mexico, 19 out of 28 (68%); New York, 10 out of 10 (100%); North Carolina, 309 out of 536 (58%); Ohio, 183 out of 419 (44%); Oklahoma, 176 out of 353 (50%); Oregon, 24 out of 63 (38%); Pennsylvania, 188 out of 417 (45%); Rhode Island, 2 out of 2 (100%); South Carolina, 105 out of 204 (51%); South Dakota, 0 out of 7 (0%); Tennessee, 117 out of 225 (52%); Texas, 194 out of 1,075 (18%); Utah, 10 out of 27 (37%); Virginia, 17 out of 152 (11%); Washington, 25 out of 40 (63%); Wyoming, 9 out of 12 (75%). *See Capital Punishment 2014 Study*, at 20, tbl. 17. For state-specific studies, see, *e.g.*, Baumgartner & Lyman, *Louisiana Death-Sentenced Cases and Their Reversals, 1976-2015*, 7 J. of Race, Gender & Poverty 58, 67-68 (2016); Baumgartner, *Rates of Reversals in the North Carolina Death Penalty*, The University of North Carolina at Chapel Hill (Mar. 22, 2010), *available at* https://www.unc.edu/~fbaum/Innocence/NC/Baumgartner_NC_Death_Reversals-March-20-2010.pdf.

does not include reversals based on invalidation of the State's capital-punishment statute. *Id.*

Direct appeal thus serves a critical function in criminal cases, particularly in capital cases. Where appellate counsel provides constitutionally ineffective assistance, many defendants may indeed "lose their life, liberty or property because of unjust convictions which appellate courts would [have] set aside" but for counsel's errors. *Griffin*, 351 U.S. at 19 (plurality). To be sure, not all errors are corrected on direct review; many capital convictions and sentences that survive direct appeal are later vacated in state or federal collateral proceedings. *See Liebman Study* 1852.[5] But as these studies demonstrate, direct appeal in state court nonetheless provides an important opportunity for defendants to obtain relief for (or at least preserve) the errors that frequently occur in capital trials.

This Court has accordingly recognized the central role of direct appeal in state court as an important bulwark against arbitrary imposition of capital sentences. In *Jurek* v. *Texas*, 428 U.S. 262 (1976), for instance, this Court upheld Texas's capital-sentencing scheme in part because Texas law provided for direct appeal as of right.[6] The Court emphasized that "prompt judicial re-

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[5] Of all death sentences imposed between 1973 and 1995 that survived direct review, 10 percent were overturned in state post-conviction proceedings. *Liebman Study* 1852. Forty percent of the cases that survived both direct review and state post-conviction review were overturned on federal habeas review during the study period, which preceded enactment of the Antiterrorism and Effective Death Penalty Act. *Id.*

[6] Texas law provides that "[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals." Tex. Crim. Proc. Code Ann. art. 37.071 § 2(h); *see also Pondexter* v. *State*, 942 S.W.2d 577, 588 (Tex.

view" on appeal was critical to "promot[ing] the even-handed, rational, and consistent imposition of death sentences under law." *Id.* at 276 (plurality); *see also Gregg* v. *Georgia*, 428 U.S. 153, 198 (1976) (approving Georgia's capital-sentencing scheme in part because it provided for "automatic appeal of all death sentences to the State's Supreme Court").

Federal habeas principles similarly rest on the understanding that, in our federal system, state appellate courts have the first and often best opportunity to review claims of error and provide any needed relief. *See, e.g.*, *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011) ("state courts are the principal forum for asserting constitutional challenges to state convictions"); *Duncan* v. *Walker*, 533 U.S. 167, 178-179 (2001) (exhaustion requirement ensures that "state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment"). Indeed, the procedural-default doctrine assumes that state courts "should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights." *Coleman*, 501 U.S. at 731.

Effective representation of defendants on direct appeal is necessary to state courts' fulfillment of their principal role in administering criminal justice. "Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson," *Halbert* v. *Michigan*, 545 U.S. 605, 621 (2005), and "the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits," *Evitts*, 469 U.S. at 393. Ac-

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Crim. App. 1996) (Texas's direct review is "a safeguard to ensure that the death penalty is not arbitrarily or irrationally imposed").

cordingly, "[a] first appeal as of right ... is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." *Id.* Where appellate counsel renders constitutionally ineffective assistance, "counsel's unprofessional errors so upset the adversarial balance between defense and prosecution," *Kimmelman* v. *Morrison*, 477 U.S. 365, 374 (1986), that the appeal cannot be relied on to ensure the fairness of the judgment. The right to effective assistance of counsel on direct appeal is thus just as fundamental to our adversary system as the right to effective assistance of counsel at trial—and critically important to resolving errors in capital proceedings. *See Martinez*, 566 U.S. at 12.

B. Defendants Cannot Raise Ineffective Assistance Of Appellate Counsel On Direct Appeal And Are Ill Equipped To Present That Claim On Collateral Review Without Counsel's Assistance

As a second basis for adopting the equitable exception, the Court noted in *Martinez* that an initial-review collateral proceeding "is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim," where counsel's errors can provide cause to excuse a procedural default. 566 U.S. at 11; *see also Trevino*, 133 S. Ct. at 1917. In particular, just as in a direct appeal, the initial-review collateral proceeding "'looks to the merits'" of the underlying claim, no other court has addressed the claim, and "'defendants pursuing first-tier review ... are generally ill equipped to represent themselves.'" *Martinez*, 566 U.S. at 11 (quoting *Halbert*, 545 U.S. at 617).

The initial-review collateral proceeding bears those same characteristics when the claim is one of ineffec-

tive assistance of appellate counsel. As in *Martinez* and *Trevino*, that proceeding is generally the first opportunity to obtain adjudication on the merits of an ineffective-assistance-of-appellate-counsel claim. By definition, the lawyer whose effectiveness on appeal is at issue cannot, during the course of the appeal, challenge his own performance as a basis for relief. *See Ha Van Nguyen* v. *Curry*, 736 F.3d 1287, 1294-1295 (9th Cir. 2013). Rather, the claim must await the appropriate collateral proceeding for resolution on the merits. Without adequate counsel in that proceeding, however, a defendant "will have ... difficulties vindicating [even] a substantial ... claim." *Martinez*, 566 U.S. at 11.

Those difficulties include navigating what one court has described as the "legal maze" of state collateral proceedings, *Pauley* v. *Ryan*, 2013 WL 663606, at *3 (D. Ariz. Jan. 22, 2013). A prisoner, "unlearned in the law," might not understand how to comply with the State's procedural rules, *Martinez*, 566 U.S. at 12; *see also, e.g.*, *Poaches* v. *Camaron*, 2015 WL 1725768, at *6 (E.D. Pa. Apr. 15, 2015) ("incarcerated *pro se* petitioners attempting to navigate the complex federal and state schema for collaterally attacking convictions" face "unfortunate ... difficulties"). For example, a prisoner asserting an ineffective-assistance-of-appellate-counsel claim must first identify the proper venue and procedural vehicle for presenting the claim. In some jurisdictions, such a claim must be raised on collateral attack in the court that heard the direct appeal, through a motion to recall the mandate, a petition for a writ of habeas corpus or writ of coram nobis, or similar filing; other jurisdictions require the prisoner to seek relief in the convicting trial court. *See, e.g.*, *State* v. *Knight*, 484 N.W.2d 540, 542-544 (Wis. 1992) (describing various procedures).

In Texas, a prisoner may seek a new direct appeal, on the ground that his appellate counsel provided ineffective assistance, by applying for a writ of habeas corpus in the convicting trial court.[7] But that procedure is complicated in capital cases by Texas's dual-track review system, which ordinarily requires a death-sentenced prisoner to initiate state post-conviction proceedings concurrently with the direct appeal. *See* 43B Dix & Schmolesky, *Texas Practice: Criminal Practice and Procedure* § 58:64 (3d ed. 2011); Tex. Code Crim. Proc. Ann. art. 11.071 § 4(a) (requiring filing of habeas application within 180 days after counsel's appointment or 45 days after State files its brief on direct appeal, whichever is later); Tex. Code Crim. Proc. Ann. art. 11.071 § 2(c) (requiring appointment of state habeas counsel "[a]t the earliest practical time" after imposition of a death sentence, but no later than 30 days after the court finds the defendant indigent). Because of those requirements, the prisoner must often file his habeas application before the Texas Court of Criminal Appeals has decided the case on direct appeal.[8] That requirement can make it very difficult to present an in-

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[7] *See, e.g., Ex parte Miller*, 330 S.W.3d 610, 622-626 (Tex. Crim. App. 2009) (granting new appeal where appellate counsel failed to challenge sufficiency of evidence supporting sentence; "[a]ny objectively reasonable attorney would have been familiar with the well-settled law" concerning sentence enhancements and "would have raised this 'sure-fire winner' claim"); *Ex parte Green*, 2016 WL 1534000, at *1 (Tex. Crim. App. Apr. 13, 2016) (per curiam) (granting new appeal where appellate counsel's failure to challenge cumulation order was deficient and prejudicial).

[8] In this case, the Court of Criminal Appeals issued its opinion affirming Mr. Davila's conviction and sentence months before his habeas petition was filed—but only because his habeas counsel missed the filing deadline. Pet. Br. 8. The petition still failed to raise any ineffective-assistance-of-appellate-counsel claim. *Id.*

effective-assistance-of-appellate-counsel claim even in state habeas proceedings in Texas. *See, e.g.*, American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* 217 (Sept. 2013).

Establishing the substantive merit of a claim of ineffective assistance of appellate counsel likewise requires effective counsel. Prevailing on such a claim requires an understanding not only of the "substantive details of federal constitutional law," but also of litigation strategy. *Martinez*, 566 U.S. at 11-12; *see, e.g.*, *Pruett* v. *Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993) ("A decision with respect to an appeal is entitled to the same presumption that protects sound trial strategy."). For example, a prisoner ordinarily must show that appellate counsel had no reasonable strategic justification for omitting a particular argument on direct appeal—a uniquely difficult argument for a layperson to craft, especially an indigent layperson confined to prison.[9] And as was true in *Martinez* with respect to ineffective assistance of trial counsel, a prisoner seeking relief for ineffective assistance of appellate counsel will not have the benefit of any prior court decision or attorney ar-

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[9] *See, e.g.*, *Ex parte McCuin*, 492 S.W.3d 733, 737 (Tex. Crim. App. 2016) (Alcala, J., dissenting from denial of habeas relief) ("Despite the apparent existence of a likely meritorious ineffective-assistance-of-appellate-counsel claim, applicant's *pro se* pleadings fail to expressly present that legal theory as a basis for granting relief, instead focusing on complaints regarding trial counsel's performance. ... [T]his oversight is perhaps understandable, given that a claim of ineffective assistance of appellate counsel is complex and involves an understanding of trial error, concepts of preservation of error, and appellate strategy. It should go without saying that such concepts are not likely to come intuitively to a *pro se* litigant untrained in the law.").

gument on the adequacy of appellate counsel. *Martinez*, 566 U.S. at 11-12; *see also Halbert*, 545 U.S. at 607.

In observing that *Martinez* did not address claims of ineffective assistance of appellate counsel, one court of appeals—in a case decided before *Trevino*—noted this Court's observation in *Martinez* that Arizona had "deliberately cho[sen]" to channel ineffective-assistance-of-trial-counsel claims away from direct appeal, where counsel is constitutionally guaranteed, to a proceeding where the prisoner has a comparatively "diminishe[d] ... ability" to present the claim, 566 U.S. at 13; *see Banks* v. *Workman*, 692 F.3d 1133, 1147-1148 (10th Cir. 2012). No precise analogue to that deliberate relocation occurs here, since a claim of appellate ineffectiveness cannot be brought on direct appeal. But *Trevino* rejected the argument that the *Martinez* exception hinges on the State's formal channeling of claims to collateral proceedings, deeming it a "distinction without a difference" whether the State formally precludes defendants from raising a claim on appeal that could otherwise have been brought there or whether the nature of the claim and the State's procedural system simply make review on direct appeal virtually impossible as a practical matter. *Trevino*, 133 S. Ct. at 1921; *see also Buck*, 2017 WL 685534, at *9; *cf. Trevino*, 133 S. Ct. at 1922 (Roberts, C.J., dissenting) (*Martinez*'s equitable exception should apply only where the State makes a "clear choice" formally to move trial-ineffectiveness claims outside of the direct-appeal process). What matters instead is whether—because of the nature of the claims and the state procedural system—the prisoner has been "impeded or obstructed in complying with the State's established procedures" in the first proceeding where review could have been obtained. *Martinez*, 566 U.S. at 13-14; *Trevi-*

no, 133 S. Ct. at 1918-1921. And when the attorney representing the prisoner in an initial-review collateral proceeding does not competently present an ineffective-assistance-of-appellate-counsel claim, the prisoner is "denied ... the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claim," *Martinez*, 566 U.S. at 11, no less than when the claim concerns ineffective assistance of trial counsel.

C. Unless *Martinez* Applies To Appellate-Ineffectiveness Claims, Attorney Error In The Initial-Review Collateral Proceeding Will Likely Deprive The Prisoner Of Any Opportunity For Review

Finally, in *Martinez*, this Court recognized that "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims." 566 U.S. at 10-11. This marked a "key difference" from *Coleman*, where the attorney errors that the prisoner invoked as cause occurred on appeal from the initial-review collateral proceeding. *Id.* at 10. Treating the prisoner's claims as barred in *Coleman* did not deprive him of a meaningful opportunity for review, because his claims "had been addressed by the state habeas trial court." *Id.*; *see also Coleman*, 501 U.S. at 755 ("[w]e need not answer th[e] question broadly" whether procedural default should apply "where state collateral review is the first place a prisoner can present a challenge to his conviction," because "one state court has addressed Coleman's claims: the state habeas trial court"). In contrast, when the error occurs in the initial-review collateral proceeding

itself, "it is likely that no state court at any level will hear the prisoner's claim." *Martinez*, 566 U.S. at 10.[10]

That rationale brooks no distinction between claims of trial ineffectiveness and claims of appellate ineffectiveness—both of which seek to vindicate constitutional rights essential to the administration of justice. As to either claim, a defendant who has a constitutionally ineffective attorney in the initial-review collateral proceeding will face the same fundamental unfairness without the *Martinez* exception: "[F]ailure to consider a lawyer's 'ineffectiveness' during an initial-review collateral proceeding as a potential 'cause' for excusing a procedural default will deprive the defendant of any opportunity at all for review." *Trevino*, 133 S. Ct. at 1921; *see also Ha Van Nguyen*, 736 F.3d at 1294-1296.

These circumstances yield the same "equitable judgment" as in *Martinez*: Allowing a federal habeas court to hear an ineffective-assistance claim "when an attorney's errors ... caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." 566 U.S. at 13-14.

As applied to ineffective assistance of appellate counsel, that equitable principle remains subject to the

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[10] The petitioner in *Coleman* sought to raise both trial-ineffectiveness and appellate-ineffectiveness claims. *See* 501 U.S. at 755. In distinguishing *Coleman*, the Court in *Martinez* nowhere relied on the fact that Coleman's case included an appellate-ineffectiveness claim, instead emphasizing that "Coleman ... did not involve an occasion when an attorney erred in an initial-review collateral proceeding." 566 U.S. at 15.

same limitations the Court identified in *Martinez* and *Trevino*. To invoke the exception, the prisoner must show that the ineffective-assistance-of-appellate-counsel claim is "substantial"—*i.e.*, that it has "some merit." *Martinez*, 566 U.S. at 14; *see also Buck*, 2017 WL 685534, at *9. And the prisoner must show either that the state courts did not appoint counsel in the initial-review collateral proceeding, or that appointed counsel was ineffective under the standards of *Strickland* v. *Washington*, 466 U.S. 668 (1984). *See Martinez*, 566 U.S. at 14. Attorney errors that do not rise to that level, or that occur in any proceeding beyond the first occasion for raising the claim, do not suffice. *Id.* at 14, 16. Moreover, applying the *Martinez* exception to appellate-ineffectiveness claims preserves the flexibility the Court left to States by adopting an equitable exception rather than a constitutional ruling. *Id.* at 16.

The outcome here thus follows directly from *Martinez*, which struck an appropriate equitable balance between the interests in "prevent[ing] federal courts from interfering with a State's application of its own firmly established, consistently followed, constitutionally proper procedural rules" and preserving "the historic importance of federal habeas corpus proceedings" in ensuring that a substantial claim of a violation of the prisoner's right to effective assistance of counsel does not go unreviewed. *Trevino*, 133 S. Ct. at 1916-1917; *see Martinez*, 566 U.S. at 9-14.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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ERICK DANIEL DAVILA,
Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATE OF NEVADA AND 29 STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CAPITAL CASE

QUESTION PRESENTED

Does the rule established in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2014)—that ineffective assistance of state habeas counsel can be seen as cause to overcome the procedural default of a substantial ineffective assistance of *trial* counsel claim—also apply to procedurally defaulted ineffective assistance of *appellate* counsel claims?

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INTEREST OF *AMICI CURIAE*

Federal habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (internal quotations and citation omitted). This case implicates these important state interests in multiple ways. First and foremost, the doctrine of procedural default is predicated on federal courts showing proper respect for state procedural rules. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) ("We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them."). Extending *Martinez* as the Ninth Circuit has already done will continue to erode that respect and will, as a practical matter, leave little remaining of *Coleman* and the important federalism principles it effectuates in this context.

Overturning the Fifth Circuit (together with four additional circuits that have hewed to this Court's express limitations in *Martinez*), while sanctioning the Ninth Circuit's expansion of *Martinez* contrary to this Court's direction, would be to act directly at odds with this Court's instruction in *Rodriguez de Quijas v. Shearson / Am. Exp., Inc.*, 490 U.S. 477, 484 (1989) that "the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Sending such mixed messages can only serve to further undermine provisions of 28 U.S.C. § 2254 designed to complement

the doctrine of procedural default to ensure that state courts remain the main forum for adjudicating constitutional issues arising during state criminal proceedings.

SUMMARY OF THE ARGUMENT

In *Martinez*, cognizant of state interests in comity and finality that influence every aspect of the law governing federal habeas relief under 28 U.S.C. § 2254, and seeking to balance those interests against an individual's fundamental right to be represented by counsel at trial, this Court carved a deliberately narrow exception out of the general rule that a claim of ineffective assistance of post-conviction counsel will not serve as cause to overcome a procedural default. Five circuits have taken this Court at its word about the limited nature of *Martinez*, refusing to apply its exception beyond the default of a claim of ineffective assistance of counsel *at trial* that occurs in an "initial-review collateral proceeding."[1] The Ninth Circuit, on the other hand, has singularly adopted an expansive application of *Martinez*, extending the rationale of *Martinez* to overcome the procedural default of a claim of ineffective assistance of *appellate* counsel.

The current state of procedural default in the Ninth Circuit exemplifies the problems that arise from extending *Martinez* beyond its express boundaries. The Ninth Circuit's current application of *Martinez* has essentially reverted the law on procedural default to

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[1] "Initial-review collateral proceedings" are "collateral proceedings which provide the first occasion to raise a claim of ineffective assistance of counsel at trail." *Martinez*, 566 U.S. at 8.

the "deliberate bypass" standard that this Court abandoned when it created the cause and prejudice standard in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and has created significant tension with the statutory provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). This case provides this Court with an opportunity to reinforce the limited nature of the *Martinez* exception, expound upon the proper application of the *Martinez* exception in a way that will curtail the problems that result from an undue expansion of the exception, and ensure that courts equitably balance all the interests that are at play in the post-conviction arena.

In addition to the problems that the Ninth Circuit is creating with its expansive application of *Martinez*, at least two other reasons support the need for this Court to decline the Petitioner's invitation to extend *Martinez*. First, despite the Petitioner's claims to the contrary, there are principled reasons for distinguishing the right to counsel at trial from the right to counsel on appeal. The most important of those reasons, which this Court has already recognized, include significant distinctions between the role of trial counsel and the role of appellate counsel and the sources of the right to counsel at trial versus on appeal. Second, Petitioner's expansion of *Martinez* is unnecessary in any event. The fundamental miscarriage of justice exception of the procedural default doctrine remains an adequate safeguard to permit review of defaulted direct appeal claims in cases where it is more likely than not that a constitutional violation led to the conviction of someone who is actually innocent.

Beyond these principled distinctions, it is also imperative that this Court not overlook the very real *practical* effect on the States of further extending *Martinez*. Consistent with AEDPA and this Court's understanding that federal habeas review of state court convictions exists only to "guard against *extreme malfunctions* in the state criminal justice system," *Harrington*, 562 U.S. at 102-03 (emphasis added), this Court has again and again admonished the lower federal courts to rigorously circumscribe their deferential review in this context. It is no secret that some federal courts have again and again simply ignored such guidance. *See, e.g.*, *Tarango v. McDaniel*, 815 F.3d 1211, 1229 n.3 (9th Cir. 2016) (Rawlinson, J., dissenting) ("The majority makes light of the many rebukes we have received from the Supreme Court for ignoring the demanding standard under which we review habeas cases. I doubt the Supreme Court will be amused.") (citation omitted), *pet. cert. pending*, No. 16-1000 (Feb. 13, 2017). While this Court does address some of these deviations, most go uncorrected; after all, this Court is not a court of error correction. Thus, as a practical matter, the reach of this Court's purportedly minor "extensions" or "exceptions" in the habeas context often have seismic practical consequences for the States. It is proper for the Court, when considering yet another expansion of federal courts' habeas review, to take this very real practical effect into account—especially where, as explained, the proposed extension of *Martinez* is unnecessary, and therefore any supposed benefits are grossly outweighed by its mischief.

Even if there was good reason to extend *Martinez* to the appellate context, this is not the case to do it.

There is a critical distinction between this case and *Martinez* that this Court should use to help curtail the many real problems that arise when courts do not adhere to this Court's express limitations on the application of *Martinez*. Unlike in *Martinez*, where post-conviction counsel filed a notice akin to an *Anders* brief,[2] post-conviction counsel here raised three claims in the post-conviction proceeding, including a claim alleging that trial counsel failed to adequately prepare a mitigation case for the penalty phase of Davila's trial. Because it is not objectively unreasonable for counsel to decline to raise every possible non-frivolous claim—or, in *Martinez* parlance, every "substantial" claim—for appellate review, this Court should require petitioners to overcome the presumption that post-conviction counsel exercised reasoned professional judgment in deciding what claim(s) to raise in an initial-review collateral proceeding before the petitioner is entitled to any relief under *Martinez*. *Cf. Robbins*, 528 U.S. at 288 (acknowledging the different burdens of a habeas petitioner in showing deficient performance of appellate counsel that filed an *Anders* brief versus appellate counsel that filed a merits brief).

Here, the federal district court correctly found the underlying claim of instructional error particularly weak, and after layering two levels of *Strickland* deference on top of an already weak claim, Petitioner overwhelmingly fails to overcome *Strickland*'s

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[2] An *Anders* brief is a brief filed by counsel "referring to anything in the record that might arguably support" an appeal that is filed contemporaneously with a motion for counsel to withdraw on the basis that counsel finds the appeal to be frivolous. *See Smith v. Robbins*, 528 U.S. 259, 271 (2000).

deference to post-conviction and appellate counsels' judgment. This case is therefore a particularly inappropriate candidate to extend *Martinez* to the appellate context.

ARGUMENT

I. This Court should decline the invitation to extend *Martinez*.

The "main event" of a criminal prosecution is the trial. *Sykes*, 433 U.S. at 90. That is why the framers of the Constitution included an amendment in the Bill of Rights listing various protections to ensure a person accused of a crime receives a fair *trial*, among them the right to representation by counsel. *See* U.S. CONST. AMEND. VI; *see also Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 159-60 (2000) (describing the structure of the Sixth Amendment). This significant departure from English common law, which did not recognize a right to counsel for persons charged with a felony, was the basis for this Court first finding a right to counsel for defendants charged with a capital offense in *Powell v. Alabama*, 287 U.S. 45 (1932). Then, in *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963), this Court expressly recognized that the right to counsel at trial is a fundamental right that is "implicit in the concept of ordered liberty," granting everyone charged with a felony the right to appointed counsel at trial.

The right to counsel on appeal is different. As a result, there are multiple principled reasons not to extend *Martinez* to the appellate context. First, the state of the law in the Ninth Circuit demonstrates that extending *Martinez* will undermine this Court's existing procedural default jurisprudence and the

statutory provisions of AEDPA. Second, there are critical distinctions between the right to counsel at trial and the right to counsel on appeal that have already been recognized by this Court. And third, the fundamental miscarriage of justice exception to procedural default remains an adequate safeguard to protect against the possibility of appellate counsel defaulting a claim asserting a violation of the Constitution that more likely than not resulted in the conviction of someone who is actually innocent.

A. Expanding *Martinez* to include claims of ineffective assistance of appellate counsel will undermine this Court's existing procedural default jurisprudence and the dictates of AEDPA.

Forty years ago, this Court altered the test for setting aside a state procedural default by establishing the "cause and prejudice" standard in *Sykes*. The Court explained why it created the "new" standard for overcoming a procedural default: it was eradicating the perverse incentive for habeas petitioners to "sandbag" state courts that resulted from the "deliberate bypass" standard that existed under *Fay v. Noia*, 372 U.S. 391 (1963), and it also sought to ensure that federal courts accorded proper respect to the enforcement of state procedural rules. *Sykes*, 433 U.S. at 89; *see also Coleman*, 501 U.S. at 750 ("*Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules.... We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.").

Inevitably, this Court was forced to address the question whether attorney errors would meet the cause requirement to overcome a default. The Court concluded that it would, but only when the error constitutes an independent violation of the constitutional right to counsel. *Murray v. Carrier*, 477 U.S. 478 (1986). And because there is no constitutional right to counsel in a post-conviction proceeding, this Court further concluded that attorney error in a post-conviction proceeding will not serve as cause for a default. *Coleman*, 501 U.S. at 752 ("Applying the *Carrier* rule as stated, this case is at an end. There is no constitutional right to an attorney in state post-conviction proceedings.") (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989)).

Nonetheless, reaffirming the importance of the Sixth Amendment right to counsel *at trial* and the special role that trial counsel plays within the adversarial system, this Court recently carved a very narrow exception out of the general rule that attorney errors in a post-conviction proceeding will not serve as cause to overcome a procedural default. *Martinez*, 566 U.S. at 12 ("A prisoner's inability to present a claim of *trial* error is of particular concern when the claim is one of ineffective assistance of counsel. The right to counsel *at trial* is a bedrock principle in our system of justice.") (emphases added); *id.* at 16 ("the limited nature of the qualification to *Coleman* adopted here reflects the importance of the right to the effective assistance of *trial* counsel") (emphasis added). Remaining cognizant of important state interests in comity and finality and addressing the dissent's concerns that the new exception would result in

perpetual litigation, this Court made clear that the exception is limited to claims of ineffective assistance of counsel at *trial* and has no effect on defaults that occur beyond an initial-review collateral proceeding. *Id.* at 16.

While the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have heeded this Court's explicit limitations in *Martinez*, the Ninth Circuit has not. *Compare Long v. Butler*, 809 F.3d 299, 315 (7th Cir. 2015); *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014); *Hodges v. Colson*, 727 F.3d 517, 530-31 (6th Cir. 2013); *Banks v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012); *Dansby v. Norris*, 682 F.3d 711, 728-29 (8th Cir. 2012), *rev'd on other grounds*, 133 S. Ct. 2767 (2013); *with Nguyen v. Curry*, 736 F.3d 1287, 1292-96 (9th Cir. 2013). And, contrary to this Court's intention that *Martinez* not create an excessive burden on the States, the Ninth Circuit's failure to adhere to the limitations of this Court's holding in *Martinez* has the effect of unwinding nearly 40 years of this Court's jurisprudence on procedural default and created irreconcilable tension with statutory provisions of AEDPA. An overly expansive application of *Martinez* reinvigorates the incentive for sandbagging that this Court sought to extinguish by abandoning the "deliberate bypass" standard in *Sykes*. *Compare Dickens v. Ryan*, 740 F.3d 1302, 1316-22 (9th Cir. 2014) (allowing a petitioner to rely on *Martinez* to avoid (1) limitations on review under 28 U.S.C. § 2254(d)(1) and *Cullen v. Pinholster*, 563 U.S. 170 (2011), and (2) limitations on evidentiary hearings under 28 U.S.C. § 2254(e)(2)), *with Moore v. Mitchell*, 708 F.3d 760, 785

(6th Cir. 2013) (rejecting petitioner's request to use *Martinez* as "a route to circumvent *Pinholster*").[3]

Additionally, the expansive application of *Martinez* creates significant tension with the statutory provisions of AEDPA. This should come as no surprise in light of this Court's prior acknowledgments that the statutory framework of 28 U.S.C. § 2254 (the exhaustion requirement, the limitations placed on merits review, and the limitations on availability of evidentiary hearings) is specifically designed to work in tandem with the doctrine of procedural default to ensure that the state courts are the main forum for litigating constitutional questions that arise in state criminal proceedings and to protect state interests in finality. *See, e.g.*, *Harrington*, 562 U.S. at 103 ("Section 2254(d) thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding."). When such tension arises between an equitable rule created by this Court and an act of Congress, the act of Congress must prevail.

This is not a mere theoretical problem. In search of a new trial, rather than a new appeal, habeas petitioners in the Ninth Circuit have in fact begun to use the Ninth Circuit's extension of *Martinez* to claims of ineffective assistance of appellate counsel to force

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[3] The more this Court expands the means by which a petitioner can overcome a procedural default and obtain review of his claims free of AEDPA deference, the stronger the incentive to "sandbag" the state courts becomes, wholly undermining AEDPA and the bedrock principles of comity and finality.

aside two layers of procedural defaults and require states to defend long-ago defaulted claims of trial court error that are raised for the first time in federal court.

This Court has held that a petitioner may not rely upon a procedurally defaulted claim of ineffective assistance of counsel to overcome a procedural default *unless* the petitioner is able to also satisfy the cause standard for the procedurally defaulted claim of ineffective assistance of counsel. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) ("To hold, as we do, that an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted is not to say that that procedural default may not *itself* be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to *that* claim."). Accordingly, habeas petitioners in the Ninth Circuit are now turning to *Martinez* as a basis to establish cause to overcome a procedural default of a claim of ineffective assistance of appellate counsel, and they then offer the same ineffective assistance of appellate counsel claim as cause to seek *de novo* review of the underlying claim of trial error in the federal habeas proceeding. *See Husband v. Ryan*, No. CV-13-1320, 2016 WL 5799039, at *7 (D. Ariz. June 21 2016); *Lippert v. Reinke*, No. 1:13-cv-00228, 2015 WL 5014359, at *8 (D. Idaho Aug. 21, 2015); *Chavez v. LeGrand*, No. 3:13-cv-00548, 2015 WL 5567284, *4-5 (D. Nev. Sept. 22, 2015); *see also Castillo v. Ryan*, No. 13-16575, App. Opening Br., at 33-35 (9th Cir. Aug. 20, 2014) (arguing the merits of the underlying *ex post facto* claim); *McKinney v. Chappell*, No. 13-55032, App. Opening Br., at 22-23 (9th Cir. Aug. 7, 2014) (noting that ineffective assistance of appellate claim was procedurally defaulted under California law

and could not serve as cause, but then turning to *Edwards* to assert *Martinez* allows ineffective assistance of post-conviction counsel to serve as cause for the default of the ineffective assistance of counsel claim); *Smith v. Ryan*, No. 2:03-cv-01810-SRB, Pet. Supp. Br. on *McKinney v. Ryan*, at 16-28 (D. Ariz. Mar. 3, 2017) (arguing IAAC claim offered as cause to overcome default of substantive sentencing error claim does not need to be independently exhausted post-*Martinez*, before briefing the underlying claim of sentencing error on the merits and seeking resentencing).

That cannot be what this Court intended in *Edwards*. The underlying basis for the holding in *Edwards* was that attorney error will not serve as cause to overcome a procedural default in the absence of an independent violation of the constitutional right to counsel that was fairly presented to the state courts, which meant that attorney errors beyond a first-appeal as a matter of right could not be asserted as cause for a procedural default. While this Court edged away from that in *Martinez*, habeas petitioners are seeking to leverage the narrow *Martinez* exception into a sea change in bedrock habeas principles. And it stands to reason that this Court did not intend for *Martinez* to open such a door when it expressly justified its limited departure from *Coleman* by distinguishing a violation of the right to the effective assistance of counsel as a form of *trial* court error worthy of special protection. *Martinez*, 566 U.S. at 12 ("A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system.").

In other words, despite the fact that a petitioner failed to fairly present the state's highest court with two separate constitutional violations, he is using *Martinez* in an attempt to obtain a new trial based upon *de novo* federal review of the underlying claim of trial court error rather than giving the state the option of giving the petitioner a delayed appeal to raise the defaulted claim in state court. As this Court has previously recognized, sanctioning this practice will harm state interests in comity and finality in an unprecedented manner by significantly undermining the fair presentation requirement for exhaustion and the limited scope of review under AEDPA and restoring the incentive to "sandbag" that this Court set out to prevent when it first developed the cause and prejudice standard.[4] *See, e.g.*, *Edwards*, 529 U.S. at 452 (acknowledging that this Court has repeatedly recognized "the inseparability of the exhaustion rule

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[4] This is particularly problematic in any instances where reasonable disagreements between the state and federal courts about the scope of this Court's clearly established holdings would otherwise preclude federal habeas relief under AEDPA. If the federal standard under prevailing circuit precedent is more favorable to defendant/petitioner than the state's reasonable interpretation of this Court's holdings, the defendant/petitioner has an incentive to withhold his claim in state court to avoid AEDPA review and seek *de novo* review in a later federal habeas proceeding. But that is precisely what procedural default and AEDPA are designed to prohibit, *Harrington*, 562 U.S. at 102-03 (noting habeas review is "not a substitute for ordinary error correction through appeal" and that AEDPA review "complements the exhaustion requirement and the doctrine of procedural bar to ensure that *state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding*") (emphasis added).

and the procedural-default doctrine"). This should be reason enough for this Court to decline to extend the equitable rule created in *Martinez* because (1) it works an injustice against the States by giving habeas petitioners an incentive to twice over deprive the state of the opportunity to correct an alleged constitutional error and reopening direct appeal issues years after the conclusion of the trial; and (2) an equitable rule like *Martinez* should not supersede Congress's clear intent expressed through AEDPA.

B. There are principled distinctions between the right to counsel at trial versus on appeal.

Petitioner faults the five circuits that have declined to extend *Martinez* to the appellate context for not identifying a principled distinction between claims of ineffective assistance of trial counsel versus appellate counsel. Putting aside that lower courts can hardly be faulted for taking this Court at its word, *Rodriguez de Quijas*, 490 U.S. at 484, there are principled distinctions between the roles of appellate and trial counsel that undermine Petitioner's request for this Court to extend *Martinez*.

1. The right to counsel at trial is a fundamental right that is enumerated in the Sixth Amendment, while the right to counsel on appeal is not.

Notwithstanding the Ninth Circuit's suggestion otherwise, *see Nguyen*, 736 F.3d at 1293-94, the right to counsel on appeal is not enumerated in the Sixth Amendment. Unlike the fundamental right to counsel at trial, which *is* referenced in the Sixth Amendment,

the right to counsel on appeal exists as a matter of due process and equal protection to ensure indigent persons are not deprived of basic access to the courts. *Ross v. Moffitt*, 417 U.S. 600, 607 (1974) ("The decisions discussed above stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."). The history and tradition behind the right to counsel at trial is traced back to the roots of our nation, while the right to counsel on appeal is only a modern creation that does not carry the same protections bestowed upon the right to counsel at trial. *See id.* at 610 (distinguishing the fundamental right to counsel at trial from the right to appellate counsel).

2. Appellate counsel plays a different role than trial counsel.

"There are significant differences between the trial and appellate stages of a criminal proceeding." *Id.* The trial stage of the criminal process is focused on the State's efforts "to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt." *Id.* Because the State has haled the accused into court, it must provide him with counsel to force the State to meet its high burden and protect the rights of the accused. *Id.* "By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or a jury below," transforming counsel's role on appeal from defending the status quo to assailing the status quo by attacking the lower court's judgment. *Id.*

Additionally, good appellate advocacy requires counsel to select the claims that maximize a client's ability to prevail on appeal—not raise every conceivable meritorious claim. That is why *Strickland* compels courts to presume that counsel exercised reasoned professional judgment in deciding which issues to raise on appeal. *Robbins*, 528 U.S. 259, 288 (acknowledging the distinction between evaluating appellate counsel's performance when counsel files an *Anders* brief and when counsel files a merits brief); *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983) (acknowledging effective appellate advocates narrow the issues on appeal by selecting the strongest claim(s) to raise).[5]

This Court has already repeatedly recognized the constitutional significance of the distinction between trial counsel's role and appellate counsel's role. Consistency therefore does not require an extension of the extraordinary trial court remedy that this Court created in *Martinez*; indeed, it militates against it.

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[5] Petitioner asserts that Texas failed to offer some strategic reason why counsel did not present the instructional error claim on appeal. Notwithstanding the fact that Texas did offer strategic explanations for counsel decision-making on appeal, *see* Br. in Opp. at 14, 17, 19, Petitioner's argument is based upon a fundamental misunderstanding of *Strickland*. *Strickland* requires courts to *presume* that counsel's performance fell within the wide range of acceptable strategic decisions, and it is the *petitioner*'s burden to overcome that presumption, not the State's.

3. Where effective trial counsel makes appropriate objections, at least one court will have ruled upon the petitioner's claim of error.

In *Martinez*, this Court was particularly concerned that, absent an exception, "no court will review the prisoner's claims." 566 U.S. at 10-11; *see also Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) ("[W]here the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer's failure to raise an ineffective-assistance-of-*trial*-counsel claim during initial-review collateral proceedings, could (were *Coleman* read broadly) deprive a defendant of *any* review of that claim at all".). But this Court was understandably not concerned with that issue in *Coleman*, because the default there was post-conviction counsel's failure to file a timely appeal from Coleman's initial state habeas proceeding. Thus, "one state court ha[d] addressed Coleman's claims: the state habeas trial court." *Coleman*, 501 U.S. at 757. And this Court in *Martinez* made clear that the general rule of *Coleman* still applies to any defaults resulting from an appeal of an initial-review collateral proceeding. *Martinez*, 566 U.S. at 16.

This is a key distinction between this case and *Martinez*. Where, as in *Martinez*, trial counsel fails to make an appropriate objection, *and then* post-conviction counsel also defaults a claim that counsel was ineffective for failing to object, the underlying claim will never receive *any* judicial consideration absent the *Martinez* exception. In contrast, where trial counsel does make the appropriate objection, but appellate counsel fails to raise it on appeal, at least one

court has reviewed the possibility of error: the trial court. Moreover, where trial counsel made an objection, but *two* subsequent counsel (direct appeal and state habeas) did not raise it, there should be a strong presumption that the objection lacks merit (or at least was not one of petitioner's stronger claims). Thus, a default in a direct appeal such as this case is less analogous to the situation presented by *Martinez*, and more like a default occurring during an appeal from an initial-review collateral proceeding.

4. Where effective trial counsel preserved an appropriate record for appeal, a habeas litigant can review that record to identify claims that were not raised on direct appeal.

Finally, as this Court has noted on prior occasions, the need for effective counsel is diminished when a petitioner is able to rely on the trial record and the work of prior counsel to raise possible claims of error. *Compare Martinez*, 566 U.S. at 11-12 (noting that inmates pursuing first-tier review in a post-conviction proceeding are ill equipped to make claims of ineffective assistance of trial counsel because they are without the work of prior counsel to rely upon), *with Ross*, 417 U.S. at 615 (acknowledging that an unrepresented appellant in a discretionary review setting can rely upon the trial court record and prior appellate briefing to set forth his claims of error). That distinction applies in this context as well. Where effective trial counsel has created a record that properly preserves errors for review, a habeas petitioner is capable of reviewing that record to identify the claims of error that trial counsel preserved for

review and compare that to the briefing from his first direct appeal to determine what claims of error appellate counsel did and did not raise on appeal.

C. The fundamental miscarriage of justice exception to procedural default is an adequate safeguard to protect a habeas petitioner against the possibility of ineffective appellate counsel.

Critical to this Court's decision in *Martinez* was a concern that an innocent person would lose the opportunity to raise a viable claim of ineffective assistance of trial counsel. *Martinez*, 566 U.S. at 12 (quoting *Powell*, 287 U.S. at 68-69). That justification for the *Martinez* exception overlooks an important point: the fundamental miscarriage of justice exception will excuse a petitioner's inability to establish cause for a procedural default where it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. *Carrier*, 477 U.S. at 495-96; *see also Schlup v. Delo*, 513 U.S. 298, 323-32 (1995).

This point is especially salient here. Requiring a showing of actual innocence undercuts the incentive for "sandbagging" the state courts that is otherwise created by extending *Martinez* to this new context. As a result, this Court should not extend the *Martinez* exception any further because the fundamental miscarriage of justice exception serves as an adequate safeguard to allow habeas petitioners to have defaulted constitutional claims addressed on the merits, while the actual innocence gateway more equitably balances the petitioner's interest in having his defaulted claims

heard on the merits against the backdrop of state interests in comity and finality.

II. This is not the case to extend *Martinez* because Petitioner has not even remotely shown that post-conviction counsel was ineffective for not raising this claim.

Even if this Court is of a mind to extend *Martinez* to this new context, this is not the case to do it. Instead, this case provides this Court with an ideal opportunity to provide much needed guidance on the application of *Martinez*.

Martinez should not be read to indicate that post-conviction counsel's performance was deficient simply because counsel failed to raise a "substantial" claim of ineffective assistance of counsel. *Strickland* requires courts to presume that counsel exercised reasoned professional judgment, and it is the habeas petitioner's burden to overcome that presumption. *Strickland v. Washington*, 466 U.S. 668, 687-91 (1984). In the post-conviction context—as has already been noted in the appellate context—this Court should presume that post-conviction counsel exercised reasoned professional judgment in selecting the claims to raise "to maximize the likelihood of success" on post-conviction review. *Robbins*, 528 U.S. at 288 ("In *Jones v. Barnes*, 463 U.S. 745 (1983), we held that appellate counsel who files a merits brief need not (*and should not*) raise every nonfrivolous claim, but rather may select from them in order to maximize the likelihood of success on appeal.") (emphasis added). Thus, *Strickland* places a dramatically heavier burden on the petitioner challenging the performance of an attorney that filed a merits brief on appeal, than an attorney filing an

Anders brief indicating counsel could not identify any non-frivolous claims to raise on appeal.

This case provides this Court with an opportunity to establish that post-conviction counsel's performance is to be viewed under the same deferential standard. In *Martinez*, post-conviction counsel filed the equivalent of an *Anders* brief, indicating she could not identify *any* claims of ineffective assistance of counsel. 566 U.S. at 18. Here, post-conviction counsel presented three issues in the state post-conviction proceeding, including a claim that trial counsel was ineffective for failing to investigate and develop mitigating evidence for the penalty phase of trial. J.A. at 133-39.

And because *Strickland* deference regarding an attorney's performance is to be based upon counsel's perspective at the time of his actions, 466 U.S. at 689, post-conviction counsel's performance should be evaluated from the view that post-conviction counsel will understand that appellate counsel is presumed to have exercised reasonable judgment in selecting the issue(s) to raise on appeal. In other words, an evaluation of post-conviction counsel's performance in reviewing prior counsel's performance should be doubly deferential.

Here, the federal district court concluded that the underlying claim of instructional error lacked merit because the "jury charge, taken as a whole" was consistent with Texas law. J.A. at 367-68. Thus, the instructional error claim was not a particularly strong issue to raise on appeal, undermining the validity of Petitioner's claim that appellate counsel was ineffective for failing to challenge the jury instructions on appeal. Given the weak nature of the claim of ineffective

assistance of appellate counsel, Petitioner here cannot overcome the deference owed to post-conviction counsel under *Strickland*. Accordingly, this case is not in a posture for this Court to extend *Martinez* because an extension of *Martinez* will only further confuse the lower courts without helping Petitioner.

CONCLUSION

There are many reasons this Court should not extend *Martinez* to claims of ineffective assistance of appellate counsel. The Amici States therefore respectfully request that this Court affirm the judgment of the Fifth Circuit.

Respectfully submitted,

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